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The Law and Politics of Foreign
Direct Investment, Democracy and
Extractive Development in
Mongolia:
A Case Study of
New Constitutionalism on the
“Final Frontier”

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requirements for the degree of Doctor of
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This thesis is dedicated to the people of Mongolia, who have endured so much in recent years.

Declaration

This thesis is my own work and has not been submitted for a degree to another university.

Some statistical data from my Masters' dissertation "Mining as a Development Strategy for Mongolia: Oyu Tolgoi and the Red Flags of a Resource Curse" (LLM, School of Law, University of Warwick, 2012-2013) was incorporated into the latter part of Chapter Two, describing some of the socio-economic costs of Mongolia's post-socialist transition, and Chapter Three, describing Mongolia's rising debt burden in 2011-2013.

Summary

This thesis provides a critical account of state transformation on one of the last ‘frontiers’ of mineral exploration and extraction. Mongolia’s struggle to consolidate its extractive development strategy lies in a fundamental tension between the nature of global capital investment and the responsiveness of national democratic institutions to their political electorate. In this sense, Mongolia is part of a broader pattern of state formation in a global era. This pattern has been recognised in established Western democracies, but, as this thesis argues, vulnerable states in the periphery of the global economy are also being affected with potentially more immediate and alarming consequences. In the context of a transition to a development strategy reliant on the extraction and export of raw minerals (primary commodities) since 1997, the Mongolian state has entered the world of competitive international finance (as opposed to development loans) and investment, in which courting and preserving the interest and ‘confidence’ of the investor is paramount for the government. In the early years of the millennium (2003-2012), Mongolian citizens became increasingly engaged in democratic political processes and particularly vocal regarding the lack of perceived public benefit from mining investment and the damaging socio-environmental consequences of extraction in rural areas. Thus, I argue that a *constitutional* struggle played itself out between the contradictory impulses of the state towards investors and citizens as evidenced in the see-saw cycles of legal and policy reform between 1997 and 2013. Consequently, by the end of 2013, the general downturn in global commodity prices and the particular “vote of no confidence” in Mongolia’s investment environment from the majority of investors led to the consolidation of a cross-party ‘stability consensus’ within the state. The process of ‘stabilising’ the investment environment has occurred at the expense of the democratic constitution of the state, demonstrated in the curtailment of Parliamentary powers over policy-making processes, the limitation of self-government for sub-national administrations and the restriction of civil society organisations’ participation in political processes. As a post-socialist state adjusting to the constraints of the global economy and the cycles of commodity markets, Mongolia provides concrete evidence of the antagonistic relationship between national democracy and global economic integration, and the reality of the latter’s constitutional impacts.

List of Mongolian Words and Acronyms

**Please note that with regard to Mongolian names, the “surname” (patronymic) is indicated as an initial before the personal name, as is customary for formal reference in Mongolia (e.g. D. Batbold).*

Glossary of Mongolian Words

Aimag – province (territorial and administrative unit)

Soum – district within a province

Bagh – sub-district within a district

Khural – council

Khoshuun – pre-socialist territorial and administrative unit

Nutag – pastoral district (customary)

Negdel – Soviet agricultural cooperative

Khot ail – group of nomadic families who move together (customary)

Tugrik – Mongolian currency

Acronyms

ADB – Asian Development Bank

BIT – Bilateral Investment Treaty

BMZ – Federal Ministry for Economic Cooperation and Development (Germany)

CAO – Compliance Advisor Ombudsmen

CMEA – (Soviet) Council for Mutual Economic Assistance

CRIRSCO – Committee for Mineral Reserves International Reporting Standards

EBRD – European Bank for Reconstruction and Development

EITI – Extractive Industries Transparency Initiative

FDI - Foreign Direct Investment

GDP – Gross Domestic Product

GIZ – Deutsche Gesellschaft für Internationale Zusammenarbeit (German Development Corporation)

HDF – Human Development Fund

IFC – International Finance Corporation (World Bank Group)

IIED – International Institute for Environment and Development

IMRI – Integrated Mineral Resource Initiative

LDA – Local Development Agreement

MIGA – Multilateral Investment Guarantee Agency (World Bank Group)

MNT – Mongolian currency code

MP – Member of Parliament

MPC – Minerals Policy Council

MPP – Mongolian People’s Party (name of the MPRP after 2010)

MPR – Mongolian People’s Republic

MPRP – Mongolian People’s Revolutionary Party

NGO – Non-governmental organisation

OTIA – Oyu Tolgoi Investment Agreement

SEFIL – Strategic Entities Foreign Investment Law

SGWMIR – South Gobi Water and Mining Industry Roundtable

SOEs – State-Owned Enterprises

UMMRL – United Movement for Mongolian Rivers and Lakes

UNCTAD – United Nations Committee on Trade and Development

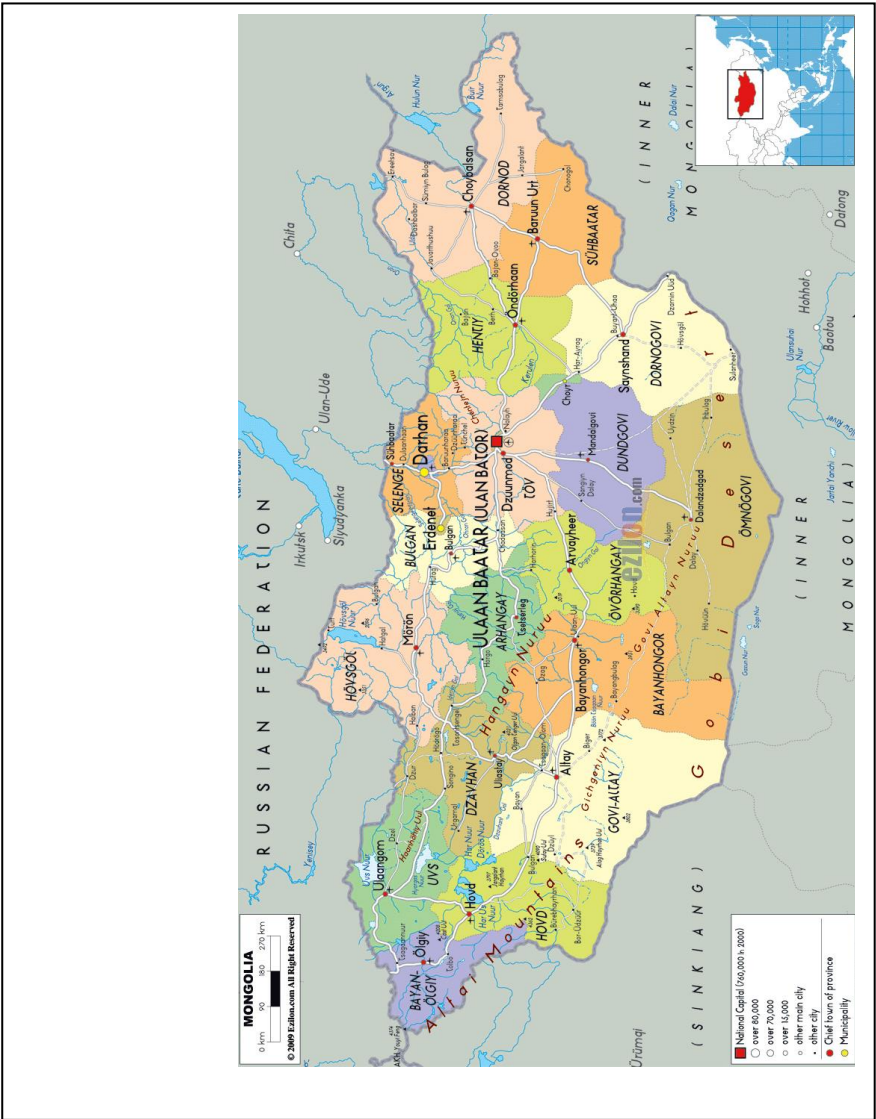
UNDP – United Nations Development Programme

UNIDO – United Nations Industrial Development Organisation

USD – U.S. Dollars

VCP – Voluntary Code of Practice (associated with the SGWMIR)

Map One: Administrative Map of Mongolia



(Source: Vidiani.com)

Chapter One (Introduction)

State Transformation and Transnational Legal Ordering in the Global Political Economy: New Constitutionalism on the “Final Frontier”

Yet the critique of capitalism is out fashion.

Ellen Meiksins Wood (1995: 1)

Introduction

At the time of writing, Mongolia teeters on the edge of an economic crisis, and many say the government has only itself to blame.¹ Endowed with incredible mineral wealth and a small population, Mongolia seemed to have everything going for it when it emerged on the global minerals market in 1997: a major market for its minerals to the south (China) and the interest of the Western investment establishment, relative to its Central Asian neighbours. A pro-market, democratised state governing a country with vast mineral potential sparked strong investment interest, as it offered a largely unexplored frontier of accumulation. However, in the first decade of the new millennium, the state appeared to haplessly mismanage the opportunity the commodity boom afforded, by routinely changing its legal and policy framework for investment in its mineral sector. In particular, investors' ire was provoked by measures which a.) designated some mineral deposits as “nationally strategic” (thereby permitting direct state participation as a shareholder), b.) introduced new screening requirements for investment, c.) limited further mining licenses, and d.) increased

¹ In late September 2016, a delegation of Mongolian state officials requested financial assistance from the International Monetary Fund (IMF). By February 2017, an external financing package of approximately USD 5.5 billion had been negotiated to support the government's ‘Economic Stabilisation Programme’ (IMF, 2017).

taxation and royalty levies. The attempted renegotiation of a major investment agreement over the Oyu Tolgoi deposit, and the cancellation or freezing of many mining licenses under new anti-corruption and environmental measures in 2011 further frustrated the mining sector as signs of ‘creeping expropriation’ (Schneiderman, 2005: 847) and nationalism. As this thesis will demonstrate, these measures reflected shifting domestic public sentiment about mining, particularly concerning foreign control of national resources, the environmental and social impacts of mining on rural communities, and heightened expectations for redistribution from the state.

However, foreign investors framed these changes as illegitimate “nationalist” moves by the government, and many who had been previously willing to risk a frontier investment became wary in this allegedly “unstable” legal and political environment. By 2013, almost every international business or financial analysis of Mongolia’s mining economy was saturated with investor woes, predictions of economic failure, and threats of investment withdrawal unless the state curbed its new preference for “nationalist” legal reforms and policy-making. Once praised as a post-socialist success story in terms of adopting democratic institutions and market-friendly investment frameworks, Mongolia appeared to be losing its nerve. The state began to rack up huge debts as commodity prices declined, and made some sudden changes to its investment regime just when investor confidence was critical to its economic sustainability. Foreign direct investment in Mongolia’s mining sector dropped from an all-time high at 44% of Gross Domestic Product (GDP) in 2011 to 0.8% in 2015 (Erdenebileg, 2017).

I argue in this thesis that the crisis of FDI in Mongolia marked a constitutional crossroads for the state, between foreign investment dependence and national democracy. Ultimately, the

investment dependence of the state came at the expense of its democratic commitments. In 2014, the Mongolian government published a new state policy committed to ‘strengthen private sector development and establish a stable investment environment’ (Otgochuluu, 2016: 68) and made a series of political and legal reforms that limit the scope of democratic and national influence on the mining economy. The purging of “nationalist” law and politics from Mongolia’s mining regime after the crisis of foreign direct investment in 2012-2013 was achieved by pro-extractive actors and institutions within the state through a series of deft institutional, legal and financial manoeuvres designed to depoliticise decision-making in the mining sector.

The constitutional implications, let alone the ‘constitution-like’ (Schneiderman, 2008: 4) features, of the anti-political commitments in the governance of Mongolia’s mining economy have not been addressed. I hope that the research presented here will fill this significant gap in the literature on the governance of extractive development in Mongolia, as well as provide a case study of an emergent form of ‘new constitutionalism’ (Gill, 1998; Gill & Cutler, 2014; Gill, 2015; Schneiderman, 2008, 2013) in the global political economy. I will expound on this concept later in this chapter, but *new constitutionalism* refers broadly ‘to the uneven emergence of a *de facto*² constitutional governance structure for the world market (one that is intended to operate regionally, nationally and globally)’ (Cutler, 2015: 89).³ While I am interested in the transnational⁴ legal and normative

² *De facto* and *de jure* are used in this thesis to designate a ‘situation or condition that exists in reality’ (*de facto*) and ‘a situation, entitlement or claim that exists by right or law’ (*de jure*) (Gill & Cutler, 2014: 315).

³ As Claire Cutler explains, ‘new constitutionalism involves the interaction of public and private power, incorporating international organizations such as the IMF and World Bank, as well as the organizations and legal frameworks of the trade and investment regime, as well as ‘domestic’ constitutional changes to lock in private property rights and investor freedoms’ (Cutler, 2015: 89).

⁴ The transnational sphere of law and norms can be understood as a product of the ‘fragmentation’ of law’s relationship with the state in the context of

dimensions of Mongolia's experience of global economic integration, I have chosen to focus on these elements in the context of the national state. Focusing on transnational legal processes without reference to the way that these are grounded and differentiated in specific jurisdictions obscures the state's role in its "global" reconfiguration (Schneiderman, 2013: 12, 33; Sassen, 2007: 14-15), and the way that the national and the local are strategically incorporated into new global state formations (Sassen, 2007).

This thesis examines the selective restructuring of the Mongolian state in its national democratic form to enable the globalisation of its economy based on foreign direct investment (FDI)⁵ in the extraction and export of primary commodities (i.e., mining). In particular, I explain *how* the national Mongolian state, economically dependent on natural resources, shed some of its democratic commitments to enable and protect foreign investment in the mining sector after the so-called "crisis" of investor confidence in 2012-2013. As attracting foreign investment has been seen as the key to unlocking the resource value of Mongolia's mineral wealth (Mungunzul and Chang, 2016), I argue that Mongolia's struggle to consolidate its development strategy based on the extraction and export of minerals lies in a fundamental tension between the nature of global capital investment, commodity markets and the

economic globalisation. While national and international law still exist, the global economy is now regulated by a complex range of legal processes and norms which break down traditional binaries between national/international, local/global, public/private, hard law/soft law, etc (Zumbansen, 2012). Thus, transnational law refers to the 'border-crossing regulatory regimes' (ibid: 312) which operate beyond the state.

⁵ Foreign Direct Investment 'refers to the investment outside the home country of the investing company in which control over the resources transferred remains with the investor' (O'Brien & Williams, 2010: 186). It can also be understood as a 'transnational production' (ibid, 188), carried out by a range of firms designated by their status of working beyond national jurisdictions. Transnational producers may go by different names (i.e., international firms, multinational/transnational/global corporations) but they are essentially engaged in the same form of economic activity.

responsiveness of national democratic institutions to their political electorate. In this sense, Mongolia has been incorporated into a part of a broader pattern of contemporary state formation: 'the world of nation-states and national economies has been dissolving, or fragmenting, restructuring around intertwined public-corporate bureaucracies' (Picciotto, 2016: 10). As a post-socialist state adjusting to the constraints of the global economy and the cycles of commodity markets, Mongolia provides concrete evidence of the ultimately antagonistic relationship between national democracy and global capitalism (Schneiderman, 2013; Streeck, 2014; Wood, 1995).⁶ The potential of democracy to shift 'the permissible bounds of state action' (Schneiderman, 2008: 7) in relation to the economy means that democratic power always has to be moderated and contained by the capitalist state to maintain its accumulation strategies (Wood, 1995: 204-237; Streeck, 2013: 16).

In this chapter, I provide an overview of key dimensions of global economic integration and introduce the main concepts that I will be using to discuss state transformation and constitutional change in this context. I will then provide an overview of the Mongolian case study, and emphasise its relevance for the field of new constitutionalism. Finally, I will reflect on the methodological choices I made in the research process.

The Global Economic Context of State Transformation and Transnational Legal Ordering

Today's global formations are diverse both as social forms and normative orders.

⁶ While liberal democracy has historically *enabled* capitalism through the institutional protection of private property and separation of political and economic spheres (Wood, 1995), the institutions of liberal democracy serve to *contain* and *limit* democratic power as much as express it. In this sense, we can still maintain that democracy conceived as a form of power and capitalism are fundamentally antagonistic, even if institutional forms of democracy have enabled capitalism to some extent.

Saskia Sassen (2007: 12)

As is now well known, an attractive business climate is likely to be a magnet for capital flow, and so states go out of their way to augment their own power by setting up havens for capital investment.

David Harvey (2005: 105-106)

The global organisation of production, exchange and finance since the early 1970s, commonly referred to in the shorthand “economic globalisation,” has major implications for the political and legal power of states (Scholte, 1997; Frieden, 2006; O’Brien & Williams, 2010: 6; Cutler, 1999). For the purposes of this thesis, the state is defined as ‘an ensemble of juridical-political institutions and regulatory capacities grounded in the territorialisation of political power’ (Brenner et al, 2003: 7), with a limited focus on national states. One of the reasons for focusing on the national state in this thesis is that it continues to be the most privileged site of political-juridical power, both in terms of its capacity to close off alternative social futures and its ongoing relevance as a site of contestation and resistance (Schneiderman, 2013: 93; 164).

Economic globalisation, as used in this thesis, refers partly to the ‘internationalisation’ and ‘liberalisation’ of capital flows (O’Brien and Williams, 2010: 424) needed to enable transnational production and markets. However, drawing on Scholte (1997: 429), the ‘spread of “supraterritorial” or “transborder” relations’ truly distinguishes the contemporary manifestation of economic globalisation from previous eras of heightened international trade. In particular, the rise of a ‘supraterritorial constituency’ (ibid: 430) of transnational investors has risen to prominence in this period. Transnational investors can be characterised as

an interlocking network of state-corporate elites centred in North America, Europe and Asia... whose structural power is articulated through a transnationally constituted geopolitics that transcends the territorially embedded interests of national capitals' (Woodley, 2015: 2).

Transnational investors, not surprisingly, operate largely within the space of transnational law and norms (see footnote 4).

While economic “globalisation” gives the impression of a systematic, evenly spread process of integration, the reality is much more uneven and complex (Harvey, 2005; Schneiderman, 2013; Sassen, 2007; Woodley, 2015). The process of economic integration is not organised by a particular actor or institution, but is dependent upon many variables, particularly the relationship between the state and capital in a given sector. This relationship can be affected by a number of factors. For example, does the state export or import capital? To what extent is a state dependent upon attracting *foreign* as opposed to domestic capital? What kind of commodities does the state export? Does the state have experience in the economic sector? To what extent do value-adding processes occur prior to export? What is the relative strength of national currency? How strong are labour and citizen controls on state power? What multilateral or bilateral obligations does a state have? Is the state connected into global capital and trade networks through specific trade agreements or World Trade Organisation membership? What geopolitical context shapes the state’s economic options?

The state-capital relation is mediated both by general frameworks which facilitate capital mobility,⁷ like multilateral trade agreements, as well as the strength of particular capital

⁷ Capital mobility is ‘the ability to move funds and assets across borders unrestricted by policies or legislation’ (Gill & Cutler, 2014: 313).

agents (e.g. multinational corporations) in relation to a particular state (Sassen, 2007: 12) within the context of ‘common capitalist imperatives’ (Dunn, 2014: 80). These imperatives structure the conditions of capitalism as a global economic system, within which particular state-capital relations are negotiated. For example, as Dunn (ibid: 84) puts it, ‘each state itself experiences competitive imperatives to accumulate’ within the global economy. No state can be described as autonomous from the universal reach of global capitalism (ibid), but there are differentiated levels of ‘influences and power’ (ibid: 85) that shape the real, albeit limited, choices of the state. Thus, the ‘relationship between [state] power and production’ may be ‘reciprocal’ (Cox, 1987: 1) or ‘intimately interrelated and co-constitutive’ (Jessop and Sum, 2001: 99), but remains undetermined. Agents of capital (e.g. investors) will respond differently with regard to the opportunity/risk structures of each state. However, as Harvey (2005: 89-91) puts it,

Capital accumulation through price-fixing market exchange flourishes best in the midst of certain institutional structures of law, private property, contract and security of the money form... Capitalists do not absolutely require such a framework to function, but without it they do face greater risks... Not all states act in an appropriate way, of course, and even when they do they exhibit a variety of institutional arrangements that can produce quite different results.

The uneven outcomes of economic globalisation are very much dependent on the capacity of the state to influence and manipulate the power of capital (Schneiderman, 2013: 35), which implies the state’s negotiation of its relationship with the *owners* of capital as well the “economic” *mechanisms* and *structures* of capital, like FDI and trade agreements (Streeck, 2014: 23). Capital

itself is differentiated based on ownership interests and concentration in particular jurisdictions (Schneiderman, 2013: 18, 35; Harvey, 2000), which also affects state capacity to attract and engage investment. Thus, on one hand the state enables capital mobility and expansion by providing the necessary political and juridical architecture for its investment, but it does not *control* the flow of transnational capital.

States can formally *participate* in the global economy by binding themselves to the global trading and financial system through legal commitments. These 'regulatory infrastructures' (Picciotto, 2016: 5) may be in the form of bilateral investment treaties, investment agreements, regional trade agreements and multilateral treaties to enable or enhance their status as capital-friendly jurisdictions (Gill, 1998; Schneiderman, 2013; 2008; Cutler, 2014; Tan, 2013).

Investors in a global market economy typically look for stable currency commitments from central banks (i.e., deflationary monetary policy), flexible taxation rates that respond to declines in commodity prices, and policy stability to not only predict but maximise returns on investments (Stanford, 2008; Streeck, 2014; Polanyi, 1944/2001). The market principles of macroeconomic stability, competition and the legal protection of private property rights are thereby adopted and institutionalised by national states in order to expand their own access to global capital and to open up new frontiers of investment in return. This particular form of institutionalisation typically involves domestic legal reform (i.e., introducing a flexible rate of exchange, removing state controls from capital markets, allowing exceptions to national taxation rates for large-scale investors, introducing international accounting standards, reforming competition policy – see UNCTAD, 2009: 7), but also the entry into a complex 'interlocking web of rules and rule-enforcing structures' that exist

beyond the scope of national political life and, once ratified, 'place significant limits on state action' (Schneiderman, 2008: 25; Sassen, 2007; Tan 2013).

State participation in the structures of the global economy alone does not necessarily guarantee investment, as indicated by the varied impact of different instruments on improving investment levels. For example, a 2009 United Nations Committee on Trade and Development (UNCTAD, 2009) report found that Bilateral Investment Treaties (BITs) had negligible impact on improving FDI flows by themselves, whereas other instruments of economic cooperation – "Preferential Trade and Investment Agreements" – improved investment flows from developed to developing countries (ibid: xii). In fact, there is some evidence that BITs 'do not attract the most development-enhancing FDI' (Golen and Guariso, 2013: 156; Yackee, J. W., 2007). However, the UNCTAD report noted that regardless of actual direct impact from participation in global economic instruments, there was usually an indirect benefit of 'enhancing the attractiveness of countries' by adding 'policy and institutional determinants for FDI,' such as 'improv[ing] investment protection and add[ing] to the security, transparency, stability and predictability of the investment framework' (ibid). Thus, regardless of actual capital flows, at least in the short-term, participation in global economic structures may have more intangible payoffs for the state in relation to capital *owners*, by improving the reliability of its investment framework, particularly in contexts where the state lacks capital or a reliable reputation for protecting investor rights.

The transnational mobility of capital creates a veritable law market (Frerichs, 2013:48). The attractiveness of the investment environment (e.g., regulations, laws, codes, repatriation rules, etc.,) in any jurisdiction becomes part of the state's competitive strategy, consistent with a market environment. The need to

attract investment, however, can be a much more intangible and political task for states than a technical one. Securing the confidence and trust of investors requires addressing their perceptions as much as adopting particular legal frameworks. As Streeck (2014: 23, emphasis added) puts it,

Exactly what returns on investment capital owners and managers demand is not set in stone; it varies with time and place. Investors may become more modest if they have no alternatives, or more demanding if their profits no longer seem enough in comparison with what they can obtain elsewhere [legal market]... Above all, if they see their social environment as hostile and inclined to impose exaggerated obligations on them, they may “lose confidence” and withhold their capital – for example, by developing a “liquidity preference” – until conditions improve... Nobody can oblige them to invest, and determining when the profit-dependent class may be willing to put their capital to work is so difficult at this point that the latest economists give up their mathematics and turn to “psychology” for an answer.

The psychological dimension of attracting investment has been recognised as a new marketing strategy for states, of which the relatively recent phenomenon of ‘nation branding’ (Dinnie, 2008) is an example. Around the world, teams of marketing experts are developing and promoting positive images of national jurisdictions to enhance the state’s global competitiveness as a destination for FDI. For example, South Africa has an International Marketing Council (IMC) with a mandate ‘to establish a compelling brand image for South Africa, which correctly positions the country in terms of its investment potential, credit worthiness, export opportunities, tourism potential and international relations’ (Johnston, 2008: 5). In

Mongolia's case, a nation-branding strategy was introduced by President Elbegdorj at the Mongolian Economic Forum in 2013. Its aim was to counteract the reputation Mongolia was quickly gaining at the time as a risky destination for investment due to the re-regulation of the mining sector. The President stated that 'the State itself has become the biggest risk,' noting that this perspective has been routinely reinforced by international standards agencies such as Ernst and Young (quoted in the UB Post, Khash-Erdene, 2013). The Minister for Economic Development at the time – N. Batbayer – stated at the same forum that,

I believe Mongolia can not only brand its products, but become a global brand nation. We have vast lands, rich with mineral wealth. Some countries have already drained their natural resources but we are just beginning to explore them. Last year Mongolia successfully released its first government bonds, named after our Great Chinggis Khaan, worth 1.5 billion USD. When we ventured to promote our bonds to other nations, we told them that Mongolia has the eighteenth largest land size — land that is full of mineral wealth; our two great neighbours are up to 500 times larger in population so we are well-positioned for trade; we are the descendants of the great Chinggis Khan; we are citizens of a democratic Mongolia; we value human rights; and we protect private property through the rule of law. And we asked them to work with us and they agreed. When we offered to sell 1.5 billion USD of bonds, they proposed to buy 15 billion USD of bonds. This indicates rising global interest and the enormous potential Mongolia has. We promised those that purchased our bonds that we would use this money for great development... The time of Mongolia to establish its name and brand has come.

Thus, successful integration into the global economy requires the authorisation of basic institutional prerequisites for transnational capital investment, as it is unlikely that without them investors will take the risk of investing (Stanford, 2008: 145). However, global economic integration also requires the sensitisation of the state to the perceptions of investors, in order to maintain and increase investment. This is particularly so in capital-importing states, whose “global” future is reliant on sustaining foreign investment interest (Schneiderman, 2013: 12).

Global economic integration thus presents a tight weave of legal rules and normative expectations from economic actors (i.e., banks, corporations) backed by a combination of hard and soft⁸ legal and financial mechanisms for their enforcement. Notably, international finance and economic law, as well as global commercial law, are amongst the most enforceable forms of transnational law as a result of arbitration-based dispute resolution. Most investment agreements and treaties include arbitration clauses, which means that dispute resolution can ‘recur to international investment arbitration’ (Knottnerus and Olivet, 2016: 2) instead of national courts. For example, Mongolia is a signatory to the Energy Charter, a multilateral agreement that protects investor interests by ‘granting fundamental rights to foreign investors with regard to their investment in the host country’ (Energy Charter, 2015).⁹ Among these ‘fundamental rights’ are ‘protection from discrimination, expropriation and nationalisation, breach of individual investment contracts, damages due to war and similar events, and unjustified

⁸ Soft law or mechanisms are ‘rules that do not have the binding force of legislation, but that are nevertheless influential in shaping behaviour’ (Gill & Cutler, 2014: 323).

⁹ In addition to the Energy Charter, Mongolia is signatory to 43 Bilateral Investment Treaties (including the USA and 18 European Union States), a Foreign Investment Protection Agreement (FIPA) with Canada, an Economic Partnership Agreement (EPA) with Japan, and trilateral EPA with Russia and China.

restrictions on the transfer of funds' (ibid). Significantly, the dispute settlement provisions explicitly aim to 'protect investor rights,' 'covering both state to state arbitration and investor-state dispute settlement' (ibid). For example, in 2015, under charges of expropriation, a Canadian mining company – Khan Resources – successfully won an arbitral award of USD 80 million against Mongolia on the basis of the Energy Charter (Knottnerus and Olivet, 2016: 5). In a small economy like Mongolia, with a Gross Domestic Product (GDP) of 11.5 billion U.S. dollars (USD), an arbitral award such as this is significant not only in financial terms but also in terms of reputational damage. The perception of instability in the investment environment can have much more significant consequences in the long-term for the state.

So far in this section I have discussed some of the structural¹⁰ and normative implications of global economic integration, both in terms of the concrete institutional steps that have to be taken for states to be competitive with regard to transnational capital flows, as well as the deeper sensitivity states have to develop with regard to investors as agents of capital. This, of course, is a simplified overview of a very complex integrative process, which depends a great deal upon the state and economic sector involved, and the power of the state in relation to capital (Harvey, 2000; Sassen, 2007). However, it is safe to say that the process of global economic integration has transformative and ordering *potential* for the state, even if its effects vary in degree. This is because global economic integration *institutionally* and *legally* organises the state's relationship with capital: the global economy is structured by a particular form of transnational legality (Schneiderman, 2013: 25). Schneiderman characterises this 'assemblage' of rules and institutions by its design 'to check

¹⁰ When the term "structural" is used in this thesis, it refers to the 'form of power embedded in historical structures and/or institutions that set the parameters or the limits and conditions of possibility for action in any given age' (Gill & Cutler, 2014: 323).

popular political processes and isolate the economic from the political sphere' (ibid). It is not a coherent system of public international or commercial law, given the lack of an 'overarching global legal system' (Shaffer, 2014: 7), but has emerged through the gap between public and private, international and national law, as the governance of the global economy generates new rules, norms and relationships *between* diverse legal disciplines, actors and adjudicators (ibid; Picciotto, 2011). These emerging rules and relationships have an ordering effect and contribute to a process of state transformation insofar as they reorient the state to new norms which 'lay out behavioural prescriptions issued by an authoritative source, whether or not formally binding or backed by a dispute settlement or other enforcement system' (Shaffer, 2014: 7). In his definition of transnational legal norms, Shaffer (ibid) includes

'those purported to be global and those that are more limited in their reach. The source of the transnational legal norm may be an international treaty, international soft law, privately created codes or standards, a foreign legal model promoted by transnational actors, or a combination of them. In other words, they can involve both hard and soft law; can be bilateral, regional, or multilateral in nature; can be constructed by states or non-state actors; and can be directed at states, corporations or individuals.'

For the purposes of this thesis, I am only focusing on those aspects of transnational legal ordering that apply to national states in the context of global economic integration. Shaffer's concept of transnational legal ordering (TLO) is useful as a measure of state transformation in this specific area, because it provides an 'analytic means for assessing transnationally induced change in a globalised world' (ibid). While I would argue that the state is 'liable to recurrent redesign, restructuring, and

reorientation' (Brenner et al., 2003: 5), and even subtle shifts in priorities can indicate "transformation" of varying degrees, it is helpful to be able to more accurately assess the *process* by which national states are transformed by economic integration beyond their borders.

Despite the transnational nature of the global economic processes, the national state remains the 'fundamental agent of global capitalism' (Harvey, 2005: 91). In particular, it plays a central role regarding the 'construction and maintenance of transnational legal norms and institutions' (Schneiderman, 2013: 162; see also 18, 25). As Schneiderman (2008: 7) argues,

Economic globalisation is usually thought of as happening "out there," beyond the capacity of states to control. At the very same time the modern state is being "decentred," rendered "defective," or "hollowed out" (Strange, 1994: 56-57), it is also deeply implicated in the process of its presumed marginalisation by establishing, through law, the permissible bounds of state action. In this process, states are important agents of economic globalisation.

The state is thus not a *victim* of the transformative or reordering effects of global economic integration, nor can it even be considered to be retreating (Picciotto, 2011: 4), as it authorises the process by which the scope and scale of its authority is changed. However, some aspects of the state, such as the prominence of particular values or institutions, may be dismantled or distorted. Sassen (2007: 54) puts it this way: 'we can say that the state maintains its level of capacity (albeit with some transformations) even as it may lose some of its autonomy.'

Even though the state enables global economic integration, it does generate a 'disconnect' (Schneiderman, 2013: 13) between national political capacity and economic power, which operates

within and beyond the jurisdictions of individual states, limiting the state in certain ways (Scholte, 1997). I argue that the 'competitive imperative to accumulate' (Dunn, 2014: 61) always exists in some degree of tension with democracy, as political norms and processes have the power to interrupt the domain of price mechanisms and market-based principles of exchange. However, this tension is exacerbated in the context of economic globalisation, where the distance between the national polity and the sphere of global exchange stretches the state's capacity to balance competing interests within and beyond its national jurisdiction. The state's capacity to meet the demands of capital without compromising its commitments to its citizens, or at least not appearing to, is very much dependent on the position of any given state in the global economic order. As Schneiderman (2013: 31) puts it, 'some states are better situated to exploit the structures of transnational legality.'

Thus, while the "co-constitutive" relationship between state and capital can be taken as given, it can manifest in a conflicted way when the interests of national actors and capital investors do not overlap neatly (Streeck, 2014). States are constituted by diverse forms of power, social and political, as well as economic; they are not 'rigorously homogenous' but relational, affected by the 'changing balance of forces within society (Schneiderman, 2013: 12). While states almost universally participate to some degree in the global economy because of their co-dependent relationship with capital (Sassen, 2007: 15), they will have other obligations and interests to balance depending upon their overall political constitution. The strength of the state in managing the balance between its national (e.g. voting) and transnational (e.g. investing) constituents becomes a critical factor in times of conflict or crisis (Streeck, 2014: 81; Schneiderman, 2013). I argue that these times of crisis can act as a constitutional crucible for

the state, by determining the interests and norms which have the power to influence national law and politics.

I will now turn to the case study of state transformation and transnational legal ordering that this thesis examines. Schneiderman (2013: 6) argues that the value of case studies in the wider field of “new constitutionalism” is their capacity to ‘illuminate precisely the circumstances and the means by which transnational legality operates... [and] how transnational legal norms effectively institutionalise pathologies associated with neoliberalism, thereby legally constraining alternative paths to development.’ The legal web and negotiating framework which facilitates the mobility of capital transnationally is produced by states in the first instance, but also *produces* different kinds of states; when ‘securing these rights, options and powers entail[s] even a partial relinquishing of components of state authority, then we can posit that this process sets up the conditions for a transformation in the role of the state’ (Sassen, 2007: 34).

Global State Transformation and Transnational Legal Ordering: The Case of “Conflicted Constitutionalism” in Mongolia

In terms of political and economic status, Mongolia exists on the margins of the globe. A land-locked desert steppe sandwiched between the territorial boundaries of Russia and China, Mongolia has a rich but largely hidden history, overshadowed by the prominence of its neighbours in the international sphere. Its major claims to fame include the legendary feats of empire of Chinggis Khan in the 13th century, the lowest population density in the world (2.8 million people to 1.5 million square kilometres) and, more recently, its mining boom. Mongolia’s vast and largely unexplored mineral base was brought to the attention of foreign investors in the late 1990s. Some of the world’s largest deposits of copper, high-quality gold, iron, coking coal and fluorspar lie

within its territory, estimated to be worth approximately 1.3 trillion U.S. dollars (Invest Mongolia, 2017). Not surprisingly, Mongolia continues to be regularly referred to as the ‘final frontier’ (ibid) by investors and mining companies.

In 1991, Mongolia embarked on a major project of political and economic liberalisation, in the wake of a collapsing Soviet Union (Reinert, 2000: 16; Rossabi, 2005: 43-114; Pomfret, 2000). Reinert (ibid) explains that,

In this sense, Mongolia is more similar to most Eastern European countries than to former planned economies in Asia. While the Republic of China and Vietnam essentially started with an economic transition only, Mongolia - true to tradition - looked West rather than South. In 1991, Mongolia embraced democracy and a minimalist laissez-faire market economy, in strong contrast to her big neighbour in the South, the People's Republic of China.

In exchange for aid and loans from international financial institutions (e.g. International Monetary Fund, World Bank, Asian Development Bank) Mongolia underwent a “structural adjustment” process which unified distinct programmes of political and economic reforms regarded at the time as a development blueprint for post-socialist states (Sachs, 1994). Mongolia was praised by Western democracies, international development institutions and academics as a ‘model pupil’ (Reinert, 2000: 17) of post-socialist transition (Munkh-Erdene, 2011: 61), as the state simultaneously adopted programmes of political liberalisation and economic deregulation to constitute a liberal democratic state and a free market economy (Fish, 2001). This broad-based liberalisation of the political and economic spheres and the limitation of state power in each was – and still is – conceived as part of the same picture of progress for the

Mongolian state: establishing a constitutional democracy based on the separation of powers and the election of political representatives, with private capital favoured as the driver of economic development (Munkh-Erdene, 2011).

Mongolia was perceived by investors in the early years of the new millennium as a vast frontier, full of mining potential, with only 25% of its minerals base explored by 2013 (International Business Publications, 2013: 145). In its national development strategy, the Mongolian state also recognised mineral extraction and export as the main driver of economic development, at least in the short to medium-term (Mongolia, 2008). To enable investment in its formerly state-owned minerals sector, the Mongolian state needed to demonstrate – legally, not just rhetorically – that the sector was *open* for investment. Like other post-socialist countries that were desperate to attract foreign direct investment (FDI) in the 1990s and early 2000s (Knottnerus and Olivet, 2016: 2), the Mongolian state – via successive governments – sought to elevate its standing and competitiveness in the sphere of investment and trade through *global economic integration*.

In Mongolia's first democratic constitution (Mongolia, 1992), the state committed to the recognition and respect 'of all forms of private and public property' (Article 5.2), intending to promote economic development 'based on different forms of property which takes into account universal trends of world economic development and national specifics' (Article 5.1). The pluralistic conception of property rights enshrined in Mongolia's democratic constitution reflected the state's new commitment to a market economy based on transferable property rights and market price mechanisms. The recognition and protection of private property was critical to Mongolia's adherence to 'universal trends of world economic development' (ibid) and integration within the global

capitalist economic system which now had hegemonic status after the fall of the Soviet Union (Munkh-Erdene, 2011: 62; Korsun and Murrell, 1995; Harvey, 2005). At the same time, Mongolia's long history of pastoral production necessitated state protection of public forms of property, such as customary use-rights in state-owned land. The resistant attitude of Mongolians, particularly in rural areas, to land privatisation (Tumenbayar, 2002; Endicott, 2012) meant that the state had to balance its new recognition of private property with an ongoing commitment to protecting public property forms. In developmental terms, this constitutional "compromise" legally reflects the ideological tension between the socialist-nationalist legacy of the state and its new capitalist commitment to global market-led economic development.

This constitutional plurality was essentially untested until 1997, when the liberal 1997 Minerals Law was introduced. The 1997 Minerals Law marked a radical departure from previous mineral codes, by enabling foreign private investment into Mongolian mineral resources. Like other historical mining booms around the world, some domestic and mostly foreign extractors arrived on this new mineral frontier, and scrambled for access to geological maps (also privatised in the early 1990s) and licenses from the Mineral Resources Authority of Mongolia (MRAM). Around the same time, in the early 2000s, in an unprecedented rural mobilisation, Mongolian citizens began to organise themselves into movements to protest private extractive access to land and water resources which had previously been held in public trust by the state. What had seemed like a constitutional compromise between the state's support for public and private forms of property – or 'national specifics' and 'universal trends' in developmental terms – turned into a major political and legal conflict about the terms of access for mining companies to Mongolia's minerals.

Between 1997 and 2014, this conflict unfolded in back-and-forth processes of legal reform as well as political bargaining within the state and beyond it, with pressure from both pro-extractive and public interest lobbies. Investor associations, civic environmental movements, international development and financial institutions, Western embassies, global credit rating agencies, government ministries and political parties all entered the fray. However, in 2014, the government introduced a new pro-extractive mining policy, to resolve the national-global conflict in the governance of the mining sector in favour of foreign investors. The State Policy on the Minerals Sector 2014-2025 reflects the new consensus within the state (across political parties) that extractive development should be *market-led* and the state's role should be to *stabilise the investment environment* (Otgochuluu, 2016), establishing a new public-private, political-economic boundary to structure the mining sector and its governance regime.

The pro-investment State Policy clearly reflects the way that pro-extractive interests eventually became dominant within the state itself, at the expense of alternative socio-political paths. I argue that the development of a globally-oriented political and legal regime for Mongolia's mining industry functioned as a *constitutional crucible*, one-sidedly resolving the tension articulated in the 1992 Constitution between the protection of private property rights and integrating into the 'world economy,' and an economic system based on forms of public property and 'national specifics' (Constitution of Mongolia, 1992, Article 5.1).

The struggle for dominance in legal and political terms over the mode of production and the process of accumulation was *constitutional* in two distinct ways. Firstly, it engaged Mongolia's diverse base of constituent power (popular as well as economic) and its outcome determined the form of the state's relationship with its democratic constituency and its market constituency, as

well as its *social* orientation towards national and global priorities. It was consequently “constitutional” in a very real sense because the outcome of this struggle reordered the state in terms of its socio-political priorities and its practices.

Secondly, it is constitutional in the sense that this reordering has ‘constitution-like’ (Schneiderman, 2008: 8) features, namely the delineation of a new legal boundary between what is considered “political” (public) and what is “economic” (private). As Schneiderman (2008: 4) puts it, political and legal transformations may be considered constitution-like in the sense that they entail ‘placing legal limits on the authority of government, isolating economic from political power, and assigning to investment interests the highest possible protection.’ This observation is reinforced by the general legacy of liberal constitutionalism to delineate an economic sphere away from the purview of government (Anderson, 2005: 123). Again, following Schneiderman (2008: 8, citing McIlwain, 1966: 21), ‘if constitutionalism is traditionally considered to be, “by definition,” about limited government, it is also about distributing authority between public and private power.’ Thus, at its root, the tension around the boundaries of appropriate state action in relation to the mining economy reflects a fundamental tension in Mongolia’s post-socialist transition in becoming a “market democracy.”

Mongolia’s transition to a mineral-exporting economy has been routinely conceived in both the academic and development policy literatures as a distinctly *economic* transformation. While this transformation may have *consequences* for nation-building (Jackson, 2015), local communities and civil society (Byambajav, 2012, 2014, 2015; Danaasuren, 2012), indigenous pastoralists’ rights (Tumenbayar, 2002; Upton, 2012), new shadow economies (i.e., artisanal mining) (High, 2012), resource distribution (Blunt, 2014), the governance of land use (Endicott, 2012), ecosystems

and climate change (Yakamura et al, 2013), national politics (Combellick-Bidney, 2012), governance norms and the role of multilateral institutions (Hatcher, 2014), the *constitutional* dimension of global economic integration for Mongolia has not been recognised or thoroughly explored. While Hatcher's (2014) case study on the transmission of multilateral regulatory norms into Mongolia's mining regime touches upon aspects of a transnational legal ordering process, her analysis largely stays "outside" the state, focusing on the role of the World Bank as a transnational norm-transmitter. I argue, however, that it is not only regulatory norms that are at stake but the orientation of the Mongolian state to global capital, which should be understood as a form of *de facto* constitutionalism (Cutler, 2015: 89).

Thus, this extended case study of Mongolia's transition to a globally-oriented mining economy offers an empirical critique of the constitutional effects of global economic integration within the national democratic state in contexts where the state has very limited leverage with investors. This reconstitutionalisation does not threaten the *state* per se, which is thoroughly entangled in enabling "globalisation," but rather disrupt the responsive capabilities of the state to its citizens. Consequently, the capabilities for public responsiveness in the state are the real "victims" of this form of state transformation, not the state itself. I argue that the antagonism between national democracy and the global economy is revealed in times of economic crisis, when the state has to *balance* the interests of its national political constituents and its global economic constituents (Streeck, 2014). This balancing act is all the more fragile in vulnerable states which lack capital clout and are dependent upon their capacity to attract the interest of foreign investors. The 'relative strength of the state' and the internal character of national political economies has been shown to be a central factor in mediating the social disruptions associated with changes in production and

accumulation (Dunn, 2014: 26). While similar patterns of democratic-market antagonism have been observed even in wealthy democratic states, particularly in the context of financial crises (Leys, 2001; Brown, 2015; Streeck; 2014), I am specifically interested in the implications of this antagonism in contexts where the state is more immediately exposed to the pressure to conform to investor expectations for market regulation through its dependence on foreign capital. Only by looking at the margins of the global economy can we see the full force of its disruptive power and develop a more realistic perspective on the political and legal dimensions of global economic integration.

Origins of the Research Project, Lines of Inquiry and Development of Research Questions

In October 2012, a group of semi-nomadic Mongolian herders submitted a claim to the Compliance Advisor Ombudsman (CAO) of the World Bank Group against a copper and gold mining project (Oyu Tolgoi) located in the South Gobi (CAO, 2017). Their claim was made on the basis of the Social and Environmental Performance Standards of the World Bank's International Finance Corporation (IFC), which had partly financed the Oyu Tolgoi project, as well as the contractual provisions of the Oyu Tolgoi investment agreement regarding socio-environmental protection. Their concerns specifically focused on the 'impacts [of the mine] to land and water, indigenous culture and livelihoods, compensation and relocation, [and] project due diligence' (CAO, 2017). After reading this "social and environmental" claim at the time, I was struck by the way that a *multilateral financial institution* was mediating a case that posed distinctly *political* problems around the recognition of a pastoral "indigenous" minority and their land rights, as well as evaluating their claim for effective redistribution from the project through compensation for losses and community investment.

The system of rules governing this public claim was derived from the investment agreements that structured the financing and the implementation of the project, adjudicated by a team of World Bank professionals in the CAO office. The advocates of the claim before this panel of experts were not lawyers, but non-governmental organisations (NGOs), who assisted the group of herders to lodge their claim. In the end, as a result of ‘stakeholder discussions conducted as part of the CAO Assessment, the complainants and company agreed to work with CAO’s Dispute Resolution function to try to resolve the issues raised in the complaint using a collaborative approach’ (ibid). From start to finish, this claim-making process against a nationally strategic mining project hardly referred to the state.

The fact that the national state and a discourse of national citizenship or constitutional rights was conspicuously absent in this case led me initially to the *question of how state-society relations were being affected by Mongolia’s transition to an extractive economy driven by foreign investment (Research Question One)*. I began with the “society” question in order to understand how citizens were organising themselves in relation to the mining industry, and analysed some of the claim-making strategies and discourses of Mongolian activist NGOs. However, it was virtually impossible to understand the organisation and coordination of NGO activity without reference to their transnational civil society network, which acted as major donors for smaller-scale national and local organisations. Focusing upon the formation of mining-critical civil society was only the beginning, because I soon realised the interconnections between the environmental NGO and corporate discourses of *responsible mining* (see Chapter 5). At this point I started to engage with *the question of how mining companies positioned themselves in relation to civil society and the state* (Research Question Two), and analysed the mineral sector’s responses to civil activism and

policy and legislative change between 1997 and 2014 (see Chapter Three).

The immense frustration and dissatisfaction of the corporate sector with the Mongolian government's regulation of the mining sector, and their self-perception as economic victims of political processes, finally led me to the question of the state as the primary focus of the thesis, into which I wove the other two "social" and "economic" dimensions of the research agenda. In fact, in asking *the question of how the transition to an extractive economy based on the export of minerals has shaped the state (Research Question Three)*, I have come to understand the way that "common-sense" conceptual boundaries between "social", "economic" and "political" are neither natural nor inevitable, but reflect a particular configuration of power. The state is the central institutional locus which mediates this configuration, drawing boundaries and erasing others, as it structures – through political and legal means – the scope and shape of productive and accumulative processes (i.e., "the economy"). This political and legal process of restructuring is a continuous and active process, at times incremental and at other times dramatic. In this way, as Jessop (1990: 10) puts it, the state is the crucial 'site of strategic action' when it comes to the way in which the state 'privilege[s] some strategies over others... the access of some forces over others, some interests over others, some time horizons over others, some coalition possibilities over others.' Thus, this thesis maintains that Mongolia's transition to a mineral exporting economy is equally a process of state transformation and reformation. It provides empirical evidence of the *selective restructuring* of the state to enable the extraction of Mongolian minerals, *redrawing* the boundaries of the political and the economic in the process, with negative implications for furthering the democratisation of both the state and the market.

This socio-legal analysis of how the aforementioned process of restructuring and redrawing occurs within and by the state has at least three concrete contributions to make to the academic literature on state formation in the context of economic globalisation. Firstly, it sheds empirical light on specific processes of change as well as a holistic analysis of local-national-global interactions between actors and institutions in context, to complement the numerous volumes of more general and conceptual work theorising implications of economic globalisation for the state. Secondly, the thesis has comparative value. While the Mongolian case exhibits particular features relating to its state history that may not be generalizable, the case can be a useful point of reference for others researching or doing advocacy work in similarly vulnerable states, where the same global pressures are being exerted in relation to primary commodities. In particular, Mongolia can be a useful regional reference for other states in Central and South-East Asia, for example Kyrgyzstan and Laos, that are undergoing rapid economic change, concentrated in primary commodities and energy sectors. Additionally, the author's interdisciplinary and qualitative methodology may be a useful point of reference for other socio-legal researchers working in the fields of law and political economy more broadly. Finally, this thesis not only works beyond disciplinary boundaries in its empirical focus, but transcends the division between description and critique. It is concerned both with facts and values, and offers a critical judgment of state transformation in this context as ultimately an exercise of capitalist domination over the meaning and the process of law-making and politics, which is disruptive to the democratisation of the state.

Socio-Legal Methodology and Thesis Structure

I have already indicated the manner in which lines of inquiry were established for this thesis, which was very much based on starting with a particular incident and “moving out” from that point to identify what factors produced that phenomena in the first place. However, it is important to flesh out the methodology of the research. While I am primarily interested in the political and juridical aspects of global capitalism, the only way to develop an understanding of these fundamentally *social* processes is to investigate a particular social context. Thus, I started with one instance of claim-making against a mining company in the Gobi Desert, and ended up analysing the political and legal structure of Mongolia’s mining regime, the political and economic history of the Mongolian state, the context and content of mining investment agreements, national development policy, NGO interventions and the perceptions of activists, investors and government about the process of regime formation and the role of the state in that process.

For example, I started the thesis with a particular question about a particular place (“why and how are Mongolian herders engaged in claim-making around mining impacts in the South Gobi?”) but it immediately required me to consider how mining investment operates globally, both within and beyond Mongolia as a legal and political jurisdiction. A similar pattern recurred through each phase of thesis development. Each line of inquiry, focused on contextual instantiations of state-society and market-state relations, required reference not only to the particular evidence of Mongolia, but also attention to the question of its relationship with broader patterns of economic, political and legal formation. I wanted to produce an historically accurate and nuanced account of the impact of global economic integration on aspects of the Mongolian state and society (vis-à-vis democratic institutions and

processes), which entailed bringing contextual dynamics and awareness of global patterns to bear on the analysis. At the same time, I wanted to expose the drive of capital to the periphery to find new frontiers of investment, and identify some of its tactics of political co-optation in “peripheral” places, like Mongolia, whose investment potential has yet to be fully “optimised.”

In this sense, Mongolia was not a “test-case” for a preconceived hypothesis about the effect of global economic integration on the state. My preliminary instinct based on the review of critical literature about economic globalisation and the state (e.g. Sassen, 2007; Harvey, 2005; Schneiderman, 2008, 2013) was that aspects of the state could be strengthened and weakened simultaneously, and that a means of exploring these dynamics was to situate them within a longer time frame. Methodologically, this entailed the development of an *historical* perspective about the Mongolian state. The purpose was to understand the current political and economic “moment” for the state, which entailed the analysis of elements of continuity and change in Mongolian state formation. Yet, *how* does one analyse continuity and change? Which facts provide the material of analysis, and against which values should the material be evaluated?

What I mainly wanted to comprehend historically was the mutual constitution of the political and the economic over time, and the role of law in that constitutional process. The purpose of developing an historical perspective was to determine whether or not Mongolia’s extractive transition was consolidating or eroding the political control of the state over processes of accumulation. I selected historical facts on the basis of whether they shed light on this co-constitutive relation, using primarily Western and translated historical and anthropological sources to provide accounts of early Mongolian history (see Chapter Two). I was able to use a combination of Western and translated Soviet sources for

Mongolia's socialist history, as well as translations of Mongolia's socialist constitutions and legal commentaries. Fully cognisant of the limitations of external sources on Mongolian history, I limited my analysis to identifying broad patterns of political-economic change.

The primacy of the historical and, consequently, the emphasis on the *process* of institutional transformation entailed an integrated approach to data collection and analysis, where the purpose of explicating a seemingly singular issue (e.g. the construction of Mongolia's mining regime) is located 'in a relation of mutual determination with an external field of social forces' (Burawoy, 1998: 20). The approach I employed was similar to Burawoy's 'extended case method' (1998: 5) which aims 'to extract the general from the unique, to move from the "micro" to the "macro," and to connect the present to the past in anticipation of the future, all by building on pre-existing theory.' This sounds nice and straightforward, as if a straight line could be drawn from the particular to the general, but in my experience, there was much to-ing and fro-ing between the poles. However, at the beginning, and in line with Burawoy's method, I began the research process with a theoretical concern¹¹ and then proceeded to analyse a particular phenomenon. After analysing a handful of community claims against mining companies, I found that the theoretical terms of my inquiry were not producing interesting results, as the claims were fairly generic.

In October 2014, I entered the fieldwork stage, with a few hunches but mostly questions about how civil society had come to organise itself in relation to the mining industry, why investment had dried up so suddenly in 2013, and how the state was responding to the social and environmental impacts of mining. As

¹¹ Initially the question of recognition and belonging in the Mongolian nation-state with the advent of 'global' claim-making processes by "local communities" vis-à-vis mining companies.

I was interested in gathering data from the ground up, using an inductive approach, I gathered contacts using the “snowball” method and gradually developing a network of contacts. My concerns at this stage were still in the state-society nexus, focusing on questions of citizenship, civic activism and the state as a mediator between corporate and community interests. I spent two months in Mongolia, mainly in Ulaanbaatar, conducting a few semi-structured interviews and observing various civil society forums about mining. I interviewed representatives from socio-environmental NGOs, consulting companies, mining companies and international financial institutions. I observed three civil society forums about the social and environmental impacts of mining and one government-sponsored forum about Community Development Agreements (see Appendix One).

In the year that followed the first exploratory phase of fieldwork, I mapped out different social and environmental governance initiatives by the state, international institutions (i.e., the World Bank) and mining companies, as well as civil activism strategies. I identified the discourses of problem-identification and problem-solving espoused by the various types of actors involved, examining both primary documents and interview data for implicit and explicit narratives. What surprised me was that where I had expected antagonism and conflict between the governance paradigms of the state, corporate and NGO sector, there was in fact a surprising degree of unity, apart from a minority of environmental activists. The focus of each “stakeholder” group seemed to be on public-private “collaboration” in governance and legal (as opposed to overtly political) solutions to corporate-community conflict. In 2014, the same year that I left for the first round of fieldwork, the Mongolian government had published a new state policy on the minerals sector, which explicitly set out the priorities of mining governance as the stability of the investment environment, and

proceeded to outline how the mining sector, the government and civil society were all supposed to work together amicably to this end. This intrigued me because it seemed to indicate that resistant elements, which had been visible between 2004 and 2013 particularly, had quite suddenly been submerged or disappeared altogether. How had this apparent “consensus” been so suddenly reached?

In October 2015, I returned to the field and set out to learn more about how state institutions and actors were interfacing with mining companies and civil society, not as passive mediators but with their own strategic focus. Using the network I had previously established, which led me to further contacts, I met with more representatives from mining companies, investor associations, policy-makers and state officials, particularly focused on interviews with government officials from the Ministry of Mining, the Mineral Resources Agency of Mongolia, the State Inspection Agency, officials from sub-national administrations, and Erdenes Mongol (a state-owned enterprise (SOEs) which manages the state’s shares in mining projects). I also pursued more interviews with civil society organisations and institutions during this fieldtrip as well, although my focus had shifted towards government/investment representatives in contrast with my initial fieldtrip. The interviews were semi-structured, in that I pursued a line of questioning but digressions from that line were welcomed since part of the intention of the interview was to learn not only about the formation of the mining regime, but also to become aware of new issues and legal developments. During the second field trip, I also observed three forums (two national level, one regional level) which focused upon different aspects of mining governance (transparency, corporate social responsibility, and local economic impacts respectively).

In total, I conducted thirty-four interviews: seventeen interviews with representatives from key government ministries, agencies and administrations; eleven interviews with representatives from organised civil society, governance consultancies, and international financial institutions; and six interviews with representatives from the mining/investment sector (see Appendix One for interview schedule). Broadly categorised, these interviews fall into three clusters: government, NGOs and international organisations, and business. However, I hope that it becomes evident how these groupings of actors transcend the political, social and economic categories associated with them respectively. I cite the interviewees by role rather than by name

The interview questions (see samples, Appendix Two) were broad and typically asked the interviewee to describe the 2012-2013 investment crisis, identify its causes and evaluate the state's response to it. While I "knew" this history quite well myself, I was interested in the interviewees' framing of the "problem" and to what extent the state's role was portrayed as the source of the crisis, or whether the nature of capital investment itself was identified as a problem. I typically also asked the interviewee to share their perceptions of other "stakeholders" in the mining regime, and the relationships between them (i.e., environmental activists and the government and/or mining companies, the government and mining companies and/or international financial institutions (IFIs)). This interview technique was chosen to generate insights into the *framing* of power within the mining regime as "political", "economic" and "social", and I asked questions about the extent to which economic actors were perceived as having political influence and the appropriate role for each "type" of actor. Similarly, I sought to generate reflection on legal developments as an historical process, whether progress was seen to have been made and why, and what the role of law

was seen to be in relation to the categorisation of power (economic/political) and the role of the state.

Tracking the trajectory of Mongolia's mining regime through the lens of legal developments provides a crucial insight into the social struggle for power over the process of extractive development. The law has played an ambivalent role in the sense that its conflicts reveal the balance of power between competing interests in the bid to develop an export-oriented extractive development strategy. The law also empirically attests to the state's negotiation with global capital(ists), and simultaneous struggle to maintain political legitimacy with its national constituency (Streeck, 2014). As the case of Mongolia demonstrates, these battles for hegemony¹² within the state are fought out over time. Consequently, examining the historical development of law from a socio-legal perspective was an appropriate and illuminating methodological choice to understand not only the framework but the dynamics of conflict over Mongolia's resource wealth.

From a socio-legal methodological perspective, the relatively submerged nature of law does not render it any less central to the analysis, because the *context* and *sub-text* of law may be given as much if not more analytical emphasis as the legal texts themselves (Frerichs, 2012; Perry-Kessaris, 2013). This is the central distinction between a "socio-legal" and "legal" approach, the latter reading law from the standpoint of doctrinal coherency. As Amanda Perry-Kessaris writes in *Approaches to the Study of International Economic Law*, 'socio-legal approaches consider not only legal texts, but also the contexts in which they are created, destroyed, abused, avoided, and so on; and sometimes their sub-

¹² Hegemony contrasts with 'supremacy' or outright domination in that sense that it 'combines coercion and consent, force and persuasion in an ethical, cultural and political process whereby the principal ideals, institutions and material potentials of the leading social forces are legitimised' (Gill & Cutler, 2014: 317).

texts' (2013: 6). Perry-Kessaris then goes on to quote Sabine Frehrichs at length, which I include in full because it strikes at the heart of the socio-legal methodology that I have used:

By text I mean the legal text, that is, the written rules and doctrines, or what can be considered black letter law. By subtext I refer to the moral subtext of a legal text, that is, its implied or deeper meaning. This includes the different notions of justice underlying a legal argument which make it necessary also to read between the lines. By context I refer to the social context of a legal text, that is, its forceful link with reality. In this perspective, law is not a self-contained discourse but a powerful social institution. (2012: 9 cited in ibid: 6-7)

In this thesis, I have partly focused on developing the historical, political and economic context for Mongolia's mining regime, setting the stages of legal development within a broader trajectory of political and economic change. Chapter Two historicises Mongolia's emergence as a *market democracy*, highlighting the gradual distinction of the state from the economic sphere and broad patterns of political-economy through the aristocratic-pastoralist (12th – 20th century), communist-industrialist (20th century), and the post-1991 democratic-free market periods. In this analysis, I highlight the symbiosis between the form of state and patterns of accumulation, maintaining the centrality of the state as an enabler of "economic" production.

In Chapter Three, I look to recent history to analyse different phases of contemporary legal development in Mongolia's mining regime, focusing on both the content of the minerals legislation itself and the context of political influences that shaped it at different points between 1994 and 2014. Chapter Four analyses the post-2014 stability consensus that has been institutionalised

to reinvigorate failing market confidence in Mongolia's extractive sector, entailing a selective restructuring of democratic features of the state. Two "axes of reordering" are observed, notably the redistribution of decision-making power between the executive and the legislative within the central state, and the restriction of self-government in favour of central state management at the sub-national level of government. In Chapter Five, I shift focus away from state institutions towards the relationship between the state and organised civil society, highlighting a third axis of reordering as a result of the emerging stability consensus: the exclusion of conflictual social movements from formal mining governance processes and debates. The reordering processes described were largely achieved through legal mechanisms, constraining the kind of political and social power that had been perceived as disruptive to investor confidence.¹³ Chapter Six focuses on the practical and normative implications of these textual and contextual legal developments for the democratic state, fleshing out the concrete risks for democratic institutions and values in Mongolia. I conclude with a cautionary reflection about the constitutional tension within FDI-dependent democracies.

Conclusion

In this chapter, I introduced the thesis research context, conceptual framework, and case study, as well as highlighted key aspects of the research process and socio-legal methodology. I argued that Mongolia's transition to a mineral-exporting economy should be understood in the context of the re-constitution of state power in relation to transnational capital. A critical constitutional perspective denaturalises the separation of the political and the

¹³ The fact that this reordering process was largely unaffected by the parliamentary election cycle (June, 2016) when the opposition party won, reinforces my claim that a *constitutional* change, as opposed to a mere policy shift, occurred during the 2014 reform process to stabilise the investment environment.

economic in the governance of market economies (Anderson, 2014: 281-282), in order to explicate the way that legal, political and economic relations constitute a broader social order (Frehrichs, 2011: 68).

In sum, global economic integration necessitates the state's alignment with the structures and agents of transnational capital (Schneiderman, 2013; Tan, 2013; Sassen, 2007). To enhance their competitiveness, states may enter into bilateral, regional or multilateral trade and investment agreements, undertake domestic legal reform to remove barriers to capital investment and engage in more discursive "nation branding" exercises. Global economic integration can have a transformative, or reordering, effect on national states by creating 'constitution-like' (Schneiderman, 2008: 8) limits on state action in relation to the economy, redistributing power between public and private actors, and shifting the normative priorities of the state. These fundamentally constitutional dimensions of economic "development" are under-recognised in global and national policy-making and by mainstream academic literature on the subjects of economic development, democratisation, international economic and investment law, and constitutional law. The Mongolian case provides an in-depth perspective on the transformative potential of global economic integration for vulnerable, capital-importing states, by demonstrating the way that certain aspects of national democratic politics and law have had to be constrained in order to ensure a "stable" investment environment for FDI.

Later chapters (Three, Four, Five) will demonstrate the way that the transnational legal norm of stability (for the investment environment) became hegemonic in Mongolia's mining governance regime after 2014, which was part of the overall renegotiation of the scope of legitimate state action in the

economy. However, it is first necessary to establish the historical context of Mongolian state formation, to see how this most recent phase of reordering fits into a longer continuum of state-capital relations. This is the subject of the following chapter.

Chapter Two

The Co-Constitutive Dynamic of the Mongolian State and Economy in Historical Perspective

Introduction

This chapter provides an historical foundation for the thesis that Mongolia's "extractive turn" towards a mining economy (1994-2014) has been equally a process of state transformation and *de facto* constitutionalism; a new boundary between the political and the economic has been demarcated over time through legal and institutional change. As I indicated in the previous chapter, the division of the political and economic into separate spheres, a fundamentally constitutional exercise, has been consolidated and deepened within Mongolia's mining regime. The institutional separation of the economic from the political in the context of global economic integrations functions to 'prevent national interference with the property rights and exit and entry options of holders of mobile capital' (Gill, 2008: 132), thereby limiting the democratic power of the state to regulate the economy according to national preferences. Furthermore, the bureaucratic and administrative power of the state has been reorganised to incorporate Mongolia's mineral wealth into the *global* minerals market. This 'neoliberal configuration' (Schneiderman, 2015: 66), where 'the economy functions as an internal limit on government' (ibid) ¹⁴ marks a substantial development within Mongolia's longer history of state-economic relations. I argue that Mongolia's extractive transformation must be regarded in terms of a *de facto* constitutional process in order to adequately conceptualise the

¹⁴ Elsewhere, Schneiderman (2013: 35, citing Harvey, 2005: 2) defines neoliberalism as 'a theory of political economy which hypothesises that human well-being will be advanced by the practices associated with the free market. It is the role of the state to "create and preserve and institutional framework appropriate to such practices."'

more fundamental reordering that is at stake in this “economic” change.

The fact that there is a political-legal dimension to Mongolia’s contemporary “economic” transformation as a mining economy is not unique to this particular reordering process, but the extent to which it marks continuities and breaks in historical patterns of state-economic formation is significant. Each major shift in the organisation of economic production in the territory of Mongolia has been accompanied by a reorganisation of state power, and vice versa, reinforcing the co-constitutive pattern of relations of production and state. The ‘instituted’ nature of economic systems in general (Polanyi, 1957: 248) makes historical analysis of power and production not only interesting, but a vital component to understanding the meaning and implications of any current development. For example, with regard to Mongolia’s emerging mining economy, the alienation of public state-owned land for the purposes of “extractive development” (i.e., mining of minerals) by private companies marks a strong break with the past, when the state had exclusive control over territory. The opening up of Mongolia’s minerals to foreign investment also led to the renegotiation of the relationship between the central government and sub-national administrations. This axis of state governance has historically played a strategic role in consolidating state authority over semi-nomadic rural subjects, as will be discussed later in this chapter; local governments have historically played a critical role in relation to rural administration.

Furthermore, the creation of a legal and institutional framework to enable and protect foreign capital investment legally and politically under the 1997 Minerals Law was no minor policy shift. It involved a substantial ‘denationalisation’ of state functions and the ‘internationalisation’ of law and policy (Jessop, 1999: 7, 10), as the Mongolian state oriented to global capital.

‘Denationalisation,’ in Jessop’s (ibid: 7) terms, ‘involves the active re-articulation of the various functions of the national state’ (ibid), such as ‘shifts in the relative power of the executive, legislature, and judiciary... [and] the reordering of relations among different political tiers’ (ibid). In addition to the ‘structural’ (ibid: 6) aspects of denationalisation, ‘internationalisation’ (ibid: 10) concerns the ‘strategic orientation [of the state] and the changing nature of policy-making.’ More specifically, it refers

to the increased strategic significance of the international context of domestic state action and the latter’s extension to a wide range of extraterritorial and transnational factors and processes. It involves both a change in the balance of the state’s strategic orientations to different scales of political action and a change in the relative importance of national and international sources of policy. This shift blurs the distinction between domestic and foreign policy, and widens the territorial bases of actors who are either directly involved in decision-making and/or whose opinions and likely reactions are taken into account’ (ibid: 10).

Thus, the growing influence of transnational actors and processes on “national” governance in Mongolia in the context of the mining economy has structural and strategic implications for the state.

However, while I argue that the denationalisation and internationalisation of the state is unique to Mongolia’s current period of “global” state transformation, similar structural and strategic shifts have taken place at other significant junctures in Mongolia’s history. In particular, Mongolia’s socialist transformation in the early twentieth century occurred in much the same way, except that it involved the *nationalisation* and *regionalisation* of the state in terms of structure and strategic

orientation. The Mongolian state broke away from Han Chinese influence and found a new position as a socialist-nationalist “aligned” state with the Soviet Union. Again, this was not simply a geo-political shift, but played a crucial role in the Mongolian state’s capitalist transformation through Soviet industrialisation programmes.

In light of these conceptual considerations, I put forward an alternate reading of Mongolian history in this chapter by examining the co-constitutive nature of political-legal institutions and economic systems over time. The majority of development literature and narratives about Mongolia contrast the socialist and democratic periods of history as antitheses in terms of state-economy relations (Rossabi, 2005; Korsun & Murrell, 1995; Reinert, 2000). While there were definitive changes at the point of transition in the early 1990s, I argue that there has been a gradual “dis-embedding” (Polanyi, 1944/2001: 60) of the economy from the political-institutional sphere through the aristocratic-pastoralist, communist-industrialist and democratic-market periods. In this process, there are a number of significant continuities and changes. The historical role of sub-national administrations as key axes of state governance continues to have contemporary significance. At the same time, there are some “breaks” with past state formations, as the Mongolian state adjusts to the regulatory preferences of foreign *private* capital, as well as a renewed geo-economic dependency upon China. These continuities and changes highlight the ways that the state in Mongolia continues to *adapt* rather than decline overall.

Conceptual Foundations: Instituted Economy and the Role of the State

In the previous chapter, I outlined the conceptual framework for the thesis as state transformation and legal ordering in its *global* and *transnational* modes, situating the Mongolian case study

within the broader literature on *new constitutionalism*. This literature is characterised by concern with ‘the uneven emergence of a *de facto* constitutional governance structure for the world market (one that is intended to operate regionally, nationally and globally)’ (Cutler, 2015: 89), which primarily serves to protect the preferences of capital investors (e.g., property rights, capital mobility, commercial dispute resolution forms, etc.). New constitutionalism is concerned with institutional developments, as well as normative questions about the governance of the global political economy: ‘[it] asks what values get promoted and who benefits from the institutional arrangements promoting global economic integration’ (Schneiderman, 2015: 67, citing Strange, 1988: 18). I am particularly interested in the way that the preferences of *foreign* investors have been ‘locked’ (Gill, 1998) into Mongolia’s *national* system of law and policy-making through a strategic combination of institutional mechanisms, financial incentives and anti-political pressures.

In this thesis, the recurring question underlying its methodology relates to the way that state-economic orders are instituted politically and legally. When it comes to Mongolia’s extractive economy, *how* has it been instituted in terms of political and legal action? Who or what *facilitates* the reorganisation of productive forces, or *fails* to prevent it? As a site of dominant political-juridical power, the state is a fundamental reference point in order to understand the process and implications of economic change. More specifically, conceiving of the state as a ‘site of strategic action’ (Jessop, 1990: 10) is useful as a means of exploring various social conditions (political, legal, ideological) that shape the reorganisation of production because it emphasises the role of *authoritative* action. The focus on the state as the most privileged site of political-juridical power further

emphasises the way in which alternative social futures are being actively closed off and ‘forgotten’ (Schneiderman, 2013: 35, 18). This is an important sub-text of this chapter and the two following, which seek to explain the manner in which particular state forms and economic organisation have come to dominate *over alternatives*.

The contemporary literature on constitutional or ‘constitution-like’ (Schneiderman, 2008: 8; 2015: 67) processes and transnational forms of ordering within the global political economy has proliferated within the context of a “Polanyian turn” in the study of law, institutions and ‘transnational markets’ (Joerges & Falke, 2011: 1). As Joerges & Falke (ibid: 2) put it, Karl Polanyi’s ‘notion of embeddedness’ critiques the understanding

of any organic, let alone harmonious, evolution of modern economies and societies... The capitalist economy is, instead, characterised as a product of deliberate, inherently contradictory, political action, with movement promoting a disembedding of the economy from social institutions, on the one hand, and counter-movements striving for protection against the destructive implications of such dis-embedment, on the other.

The role of the state in relation to the institutionalisation of the economy will be briefly outlined below, before moving on to the substantive discussion of the Mongolian case.

Karl Polanyi’s seminal work – *The Great Transformation* (1944/2001) – critiques the abstract conceptualisation of the market economy in neoclassical economics, epitomised in the work of Friedrich von Hayek. Polanyi carefully constructed an historical account of the formation of a “self-regulating” market economy in England, as well as a global financial system based on the Gold Standard, in the late nineteenth century. Polanyi’s

account provides ample and definitive evidence of the way that the state actively constructs and maintains the domain of the market economy through legal and political institutions, such as guaranteeing the 'continuity of titles to property' upon which the market system depends (ibid: 243). Polanyi understood the separation of political and economic spheres as a distinctive product of the historical institutionalisation of the 'self-regulating market' (1944/2001: 74; Ebner, 2011: 22-23). In his words, 'a self-regulating market demands nothing less than the institutional separation of society into an economic and political sphere' (Polanyi, 1944/2001: 74). Polanyi emphasised the historically constructed nature of this apparent separation in order to denaturalise it, contra Hayek (1944/2001), for whom the formation of markets independent of the political sphere was a sign of civilisation and organic progress.

Crucially, Polanyi recognised the role of the state in the formation of a sphere of economic exchange based on price mechanisms, economic value and the law of contract, as well as the state's potential to help ameliorate the social 'dislocations' associated with the commodification¹⁵ of labour, the environment and money within the market framework of exchange (Polanyi, 1944/2001: 59-60, 71-80; Ebner, 2011: 21). Markets presume certain types of social relations, notably characterised by commercial motivations and contractual relationships (Ebner, 2011: 30). As Polanyi (1944/2001: 71) puts it, 'a market economy is an economic system controlled, regulated and directed by market prices.' He adds that,

A further group of assumptions follows in respect to the state and its policy. Nothing must be allowed to inhibit

¹⁵ Commodification can be defined as 'the process of transforming social relations and processes, things (e.g. life-forms, land, natural resources) or ideas into commodities or good that can be bought and sold in capitalist markets' (Gill & Cutler, 2014: 314).

the formation of markets... Neither price, nor supply, nor demand must be fixed or regulated; only such policies and measures are in order which help to ensure the self-regulation of the market by creating conditions which make the market the only organising power in the economic sphere (ibid).

In this sense, ‘markets are never fully disembedded, for they always require some institutional scaffold to sustain their operation’ (Ebner, 2011: 27; Polanyi, 1944/2001: 71). However, the social basis of that ‘institutional scaffold’ (Ebner, 2011: 27) is crucial in terms of distinguishing what type of social relations the market is embedded in. For instance, while markets can be said to always be ‘politically embedded in distinct legal rules and institutions’ (ibid), these legal rules and institutions, depending on their location and motives, might reinforce rather the idea that the economy should be ‘organised in separate [economic] institutions, based on specific [economic] motives and conferring a special status’ (Polanyi 1944/2001: 60). This type of “embeddedness,” referring to the institutional architecture that supports the functioning of a market economy, is essentially a form of social ordering based on the market (ibid), where ‘rules and norms institutionalise the competitive order of market exchange’ (Ebner, 2011: 28).

Embeddedness, in the normative sense in which Polanyi uses the term, refers to the economy being embedded in *non-economic* social relations, which effectively disrupts the commodification of people, land and money. Thus, while markets do involve a particular kind of sociality, Polanyi’s understanding of the “social” is a specifically *de-commodified* notion, where relations are regulated by non-economic institutions and norms. As Ebner argues (2011: 33), Polanyi’s connection between embeddedness and decommodification is a ‘crucial’ dimension of Polanyi’s normative contribution to the study of the ‘formation of

transnational markets': the description of the political-legal coordination of markets is part of a critique of the particular *kind* of social relations involved. In fact, as Schneiderman points out (2008: 4), Polanyi was one of the first to link the idea of liberal constitutionalism with its function as a 'device for securing uniformity and homogeneity in state practices' for the purposes of instituting a *separate* economic sphere.

The historical rendering of the instituted nature of the economy, inspired by Polanyi's approach, dovetails neatly with the working definition of the state given in the first chapter, described as 'an ensemble of juridical-political institutions and regulatory capacities grounded in the territorialisation of political power' (Brenner et al, 2003: 7). The idea of state power as an 'ensemble' helpfully breaks down the concept of the state as a unitary institution. For example, the power of the state is constituted by diverse *forms* of power (e.g., administrative, legislative, bureaucratic, authoritarian, democratic), political and economic constituents (e.g., voters, financiers) and mediated by different institutions. The following exposition of Mongolian history will examine the role of the state in relation to the organisation of the economy during three distinct periods (aristocratic pastoralist, communist-industrialist, democratic-market) in order to illuminate the way in which state-economic relations have shifted over time, with reference to geopolitical context, socio-political constitution and normative-juridical structure. I argue that, prior to state socialism in the twentieth century, the economic sphere was firmly entangled within political relations, but became gradually 'disembedded' from that position. The industrialising impetus of the socialist state gradually distinguished the economy from the state, as will be demonstrated in due course, but it was only in the context of the post-socialist transition that the creation of a "free" market economy (i.e., outside of the state's direct control) was attempted. This historical background lays the

foundation for the development of my argument that Mongolia's extractive transformation since the late 1990s has been consolidated institutionally through the protection of the mining regime from national "political" influences that could challenge the interests of transnational capitalists.

Before embarking on the next section, it must be stated at the outset of the substantive portion of this chapter that I am heavily indebted to the work of David Sneath and other political anthropologists for the analysis of early (pre-socialist) Mongolian statecraft. Favoured methods that examine the complexity of historical social relations, anthropological sources have been invaluable for deconstructing the developmentalist assumptions that have characterised both Western (capitalist) and Soviet (technological Marxist) renderings of Mongolian history in the twentieth century. This chapter is a re-reading of mostly secondary historical sources with regard to pre-socialist state forms, although I do work with primary legal and policy texts from the socialist and democratic periods in the latter part of the chapter. Aware of the paucity of literature by Mongolians about their history and the limitation of my Mongolian language ability, I only attempt a modest overview of state-economic nexus as relevant to my thesis, in order to show systemic trends.

State-Economic Relations Prior to the National State: An Overview of the Mongol Aristocratic-Pastoral Order (Twelfth – Twentieth Centuries)

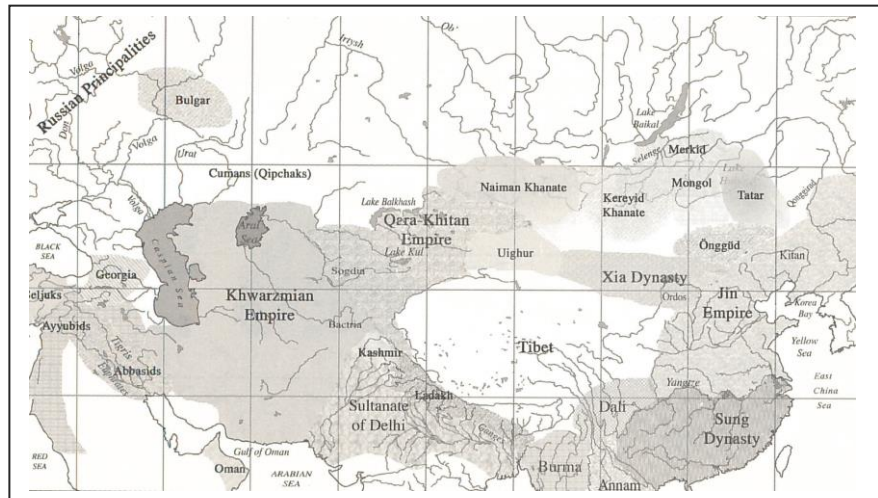
Without the a priori separation of the social forms into tribe or state by their presumed essences, we can see state and state-conditioned processes distributed through the lifeworlds of those subject to all manner of political authorities. This appears to have been as true of pastoral aristocratic orders as it is of the industrial "governmental" state.

There has been a strong tendency in Western anthropological and political theory, as well as popular culture, to idealise the nomadic culture of the steppe as egalitarian and opposed to the hierarchical, bureaucratic structures of sedentary states (Sneath, 2007). Through the lenses of evolutionary political theory, nomadic societies have typically been cast within the framework of tribalism. In the Mongolian case this is particularly so: Mongol society has regularly been designated as “tribal” (ibid: 53-54), characterised by an egalitarian political culture and simple modes of production (pastoral nomadism), or as a form of feudalism (Bold, 2001; Sneath, 2007: 125-131). As will be discussed later in the chapter, the feudalist frame served a critical narrative purpose for the communist revolutionaries in the early twentieth century, who portrayed the political and religious nobility as feudal overlords to be overthrown. In the anthropological literature, Mongols have also been regularly portrayed as fiercely independent, horizontally organised social groups lacking centralised authority or the type of stratification needed for class formation (Sneath, 2007: 2-5). The presumed lack of hierarchy was based on an assumption that nomadic, mobile societies were a pre-political form of social organisation, having not acquired the complex political structures found in sedentary societies, such as stratification, centralisation and class formation (ibid: 53, citing Burnham, 1979: 349-360, Dahl, 1979: 261-280; Bold, 2001). In many ways, these perceptions have informed contemporary popular representations of Mongolia, both Western and Mongolian. The image of independent nomads with complete freedom of movement has powerful “pre-political” (i.e., pre-territorial) connotations, feeding modern national pride about Mongolians as “close to nature” and independent (Orhon, 2011), as well as reinforcing more negative tropes (i.e., “lazy”, “disorganised,” “distrustful”).

Notably, this “ideal-type” perspective about the nomad as wandering boundless and free (Sneath and Humphrey, 1990) is linked with the treatment of pastoralism as a simple subsistence mode of production, portrayed as both pre-political and pre-economic. However, this simplistic understanding of early Mongol society simply lacks evidence after a closer analysis of primary historical texts and critical anthropological engagements with Mongol political and economic history. The movements of Mongol nomads have always been embedded within not only relations but institutions of rule (Sneath and Humphrey, 1999; Sneath, 2010). While the establishment of the first Mongol nation-state in 1921 – the Mongolian People’s Republic (MPR)–manifested particularly modern territorial and national state characteristics, it was not the first instance of statecraft on the steppes of Inner Asia (Sneath, 2007). As far as we know, ethno-linguistic ‘house societies’ (Sneath, 2007: 111) have inhabited the region of Inner Asia from at least 200 B.C. with the Xiongnu Empire (ibid: 114; di Cosmo, 1994). Furthermore, as Sneath (2007: 16) emphasises, mobile pastoralism should be understood ‘as a political economy,’ in contrast to the tribal narrative that frames it ‘as a simple subsistence economy unable to support great complexity or hierarchy’ (ibid; 20). He argues that (ibid: 17),

Mobile pastoralism is framed and transformed by political power just as sedentary agriculture is, and, while clearly different, it allows just as many possibilities for the accumulation of wealth and the construction of large-scale systems as agricultural techniques do. In both cases, the economic possibilities depend upon the nature of the property regimes that exist for resources and products and the wider political systems that frame them.

Map Two: Mongol Territories in the Twelfth Century prior to



Chinggis Khan's Empire (Source: Sneath, 2007: x)

Socio-Political Constitution of the Early Mongol State

Essentially, Sneath (2007, 2006) argues that the pre-socialist Mongol state was distinguished by its complex aristocratic political formation. Against the tribal construction of early Mongol society, he argues that Levi-Strauss's idea of the 'house society' is more appropriate for understanding political forms in the Inner Asian region: tribal terminology inaccurately perpetuates the 'mythical' imagination of early Mongol society as 'the ideal-typical pastoral nomadic society, composed of egalitarian clans of fierce and free tribesmen' (Sneath, 2007: 156; Sneath, 2009). Similarly, he uses the notion of 'ruling houses' to counteract the simplistic frame of feudalism that characterises much of the literature about Mongol statecraft during the Chinggisid and Qing empires. The feudal bias in the literature is argued both by Sneath and Skrynnikova to reflect a simplistic interpretation of Mongol 'vocabularies of power' (Sneath, 2006: 11; Skrynnikova, 2006: 85-115), by primarily understanding the early Mongol state in kinship/tribal or feudal terms. A primary example of this oversimplification can be seen in the treatment of

the terms *qarachu* and *bo'ol* which are commonly translated respectively as “commoner” and “slave” (Skrynnikova, 2006: 87-115). When translated, these terms fit neatly into a feudal imagination, close as they are to the notion of a vassal. However, a feudal order based on lord-vassal relations obscures the particular ‘institutions of submission-dominance’ (Sneath, 2006: 12; Skrynnikova: 2006) that actually characterised political relations at the time. In contrast to the absolute nature of the lord-vassal relationship, the Mongol aristocratic order was based on relative and multiple layers of hierarchy:

“Submission” as “slaves” did not mean the total deprivation of rights... the term bo'ol, then, does not mark a unit of the class structure [but] it models relations inside the unfolding political organisation... the terms bo'ol as well as qarachu ('commoner') mark hierarchy inside the political community and form part of the mechanism for socio-political integration. Bo'ol status gives both material benefit (transfer of allegiance to a stronger suzerain provides, correspondingly, a higher level of protection and patronage) and social status in a prestigious community. In no way did the term bo'ol mark a certain type of dependence. Dependence supposes an indispensable non-equality of the sides: the subordinated side receives partial compensation in the form of patronage, protection and help because it is not in a state to secure its existence independently; while the senior side demands recognition of dependence in some form (social and material). This is what we see in Mongolian society of pre-empire and empire periods. (Ibid: 101)

This is important because it demonstrates that ‘pre-eminently political formations’ (Sneath, 2007) existed prior to the socialist nation-state, supported by a unique mode of production: pastoral

nomadism. To belong in the early Mongol polities was neither based purely on familial association or feudal domination, but reflected a complex “social contract” characterised by a distinctive form of statecraft itself, not simply a *developmental step* towards the formation of a “real” state (Sneath, 2007). Kinship relations were certainly an historical part of the social order of Inner Asia, but like class and ethnicity, not its principal basis (Sneath and Humphrey, 1999: 15). For example, even prior to the Mongol Empire in what is typically referred to as the “tribal era” of Mongolian history, ‘ruling houses or lineages were not related by descent to the people they ruled,’ (Sneath, 2006: 14), thus undermining the notion that kinship relations were primary in early political formations. As Sneath argues, Mongol aristocratic statecraft included a variety of ‘power technologies’ that we associate with states in political theory, such as stratification, forms of territorialisation, taxation and military service (Sneath, 2006: 16; 2007: 5).

It is vital to note the centrality of the pastoral economy within this aristocratic system of rule; relations of production were thoroughly embedded *within* the socio-political relations of the state. The political and economic viability of both the aristocratic houses and, later, the monasteries depended upon the control of nomadic subjects and the productivity of livestock raising. Pastoral production was thus absolutely embedded within this political formation. This was partly due to the way that the control of nomadic subjects was critical to the legitimacy of the early Mongol state. Despite changes in the wider geopolitical environment in which Mongol ruling houses existed, the fundamental intertwining of the aristocracy and pastoral production meant that mobile pastoralism continued as a politically embedded economy up until the socialist period. The symbiosis of the political and economic during this period meant that it is not possible to draw a distinct line between state and the

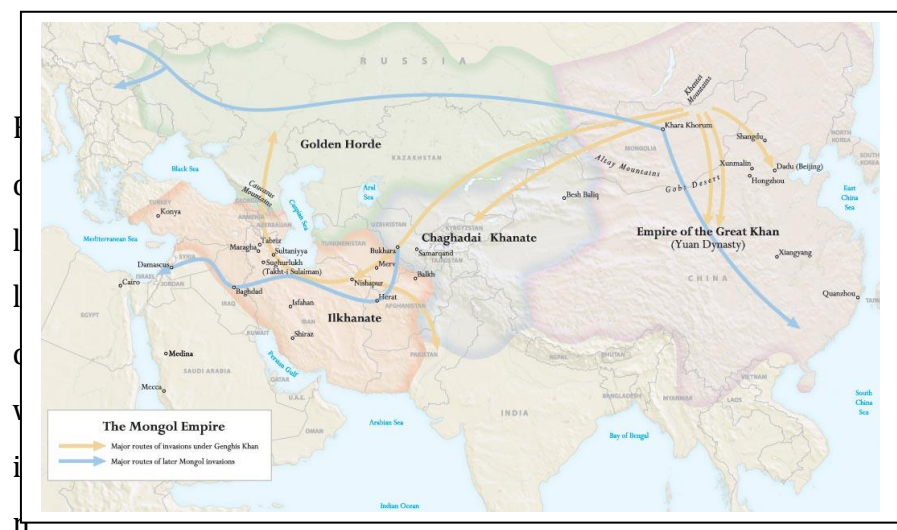
pastoral economy, in the sense that the 'property regime' (Sneath, 2007: 17) was fixed firmly within aristocratic power relations.

Thus, the 'allocation of subjects to domains of power was a key feature of aristocratic power' (Sneath, 2006: 17). Against feudal forms of rule, however, this allocation occurred in a context where the nobility did not *own* land but exercised 'collective sovereignty' (ibid: 7) in the administration of pastoral production. According to Sneath (ibid), collective sovereignty conceptualises the way in which Mongol aristocracies treated rule as a 'common project of the ruling house' and consequently entailed a strong sense of loyalty among their nomadic subjects, who were integrated into the aristocratic order through the relative hierarchies of *bo'ol* and *qarachu*. "Economic" production was thus thoroughly embedded and difficult to differentiate within the socio-political hierarchy.

Chinggis Khan's conquest of Eastern and Central Asia in the 13th century, through the Middle East to the border of Western Europe, continues to be the most significant era of Mongolian history in terms of consolidating a strong sense of Mongol identity and territory. There are a number of reasons for this. Chinggis Khan united the fragmented 'khanates' (Sneath, 2010: 110) into what we know of now as the 'Chinggisid polity' (Sneath, 2010: 100) through military coercion, but also through the introduction of a written *Mongolian* script and the promulgation of a politico-religious myth on his divine 'right to rule' (Rachewiltz, 1973/2010: 167) based on the commonly-held shamanist worldview of Inner Asian pastoralists. Rachewiltz (ibid: 168) argues that this politico-religious myth was a critical ideological tool to the formation of a territorial Empire. Confounding expectations of the "boundless, wandering nomad," the Mongolian identity that was forged through the Mongol

Empire was both mobile and territorial, with ‘intertwined’ (Munkh-Erdene, 2006: 57) ethno-linguistic and politico-religious discourses that imply a ‘conception of political unity’ between the Mongol people and early Mongol statecraft (Barthold, 1961: 21-22 quoted in Rachewiltz 1973/2010: 168). According to Munkh-Erdene (2006: 60-61), the coincidence of these two discourses existed throughout the era of the Chinggisid polity through the Qing empire up until the socialist revolution of 1921. This strong sense of Mongol identity preceding the development of a national state explains the initial popular resistance to the secularisation and socialisation policies and purges of the socialist Party in the late 1920s and 1930s (Bawden, 1989: Chapter 7 and 8), as will be discussed in a later section.

Map Three: Mongol Territory at the Height of the Mongol Empire
(source: mongols.eu)



g the reign of Kubilai Khan,¹⁶ whose rule of the Mongol Empire has been characterised as a time of peace, disputes between the Mongol nobility destabilised the Empire as a whole. The Inner Asian region was fragmented into princedoms under the various Mongol nobles who had been given authority over portions of land by the Khan. In the second half of the sixteenth century, the

¹⁶ Chinggis Khan's grandson, who ruled the Mongol Empire at its height (1260-1294).

adoption of Buddhism as the official religion of the Empire, following the conversion of Altan Khan (Bawden, 1968/1989: 28) added the power of Buddhist religious establishments to the interlocking milieu of political authorities of the period. In particular, the monasteries functioned in similar ways to the aristocratic ruling houses, imposing taxes upon the subjects of their domains and perpetuating a similar form of political relations based upon relative hierarchy and collective sovereignty. However, the rise of Buddhism also added strength to the growing sense of boundaries around what legitimately constituted Mongol identity.¹⁷ Integrated as it was into the political ideology of the state, the rise of Buddhist institutions was achieved not only through missionary activity by Tibetan Buddhist lamas but also through anti-shamanist violence, which forced the majority of Mongols to abandon their traditional beliefs (ibid: 32-33). As Bawden (ibid: 33) notes,

While missionizing against the shamans, the lamas took care to identify themselves with the ruling class, with the result that while Buddhism thoroughly penetrated all levels of Mongol society in the coming centuries, organisationally it developed almost as a state within a state. It was a body distributing high titles, owning enormous wealth in flocks and herds and in serfs, and enjoying such political prestige that the Manchu emperors tacitly recognised the supreme head of the faith... the "Living Buddha" of Urga, as a quasi-ruler over the people... From very early on the nobility and the higher clergy saw in mutual identification of interests the way to continuing power (see also ibid: 69).

¹⁷ The rise of Buddhism in Mongolia occurred at the expense of shamanism, which was gradually forced 'underground' or synthesised within a Buddhist framework (Bawden, 1968/1989: 32-33).

Map Four: Mongol Territory in the Manchu Qing Empire (Source: Sneath, 2007: xi)



The establishment of smaller domains of authority with the demise of the Mongol Empire and the rise of the Manchu Empire (also referred to as Qing Empire) imposed new limits upon the mobility of pastoral nomads. Fernandez-Gimenez (1999: 319) argues that this was ‘the first time that groups of herders were associated with fixed or specific territories.’ While this may be the case, it is important not to over-state this restriction of movement upon Mongol nomads seeing as extensive customary legal norms had existed around pasture rotation during the pre-Empire era (Sneath, 2001; Fernandez-Gimenez, 1999). It is not as if this establishment was the first “limit” for Mongol nomads, rather it reflected a deepened centralisation of authority which had always existed to varying degrees (Sneath, 2006: 17). Sneath (ibid) explains that,

Certainly since the time of the Mongol Empire, and perhaps from long before it, the steppe aristocracy and its distinctive form of military-civil administration can be seen as the ‘sub-strata of power’ upon which grander imperial designs were based... the broader picture that emerges is of power structures more centralised... or less centralised, interacting in various

modes of articulation, competition and superimposition as part of contingent historical processes.

For example, even in the ‘relatively decentralised political landscape’ (ibid: 17) of the 17th century when the Mongol empire had become properly factionalised between aristocratic groups (i.e., the Oirat and the Chinggisid nobility) and religious establishments, the system of rule retained its distinctly aristocratic hierarchy. The pastoral subjects of the ‘ruling houses’ were governed through administrative regulations to ‘[prevent] commoners defecting to the jurisdictions of other nobles’ (ibid; Natsagdorj, 1967/2010: 695). Despite the factional nature of post-Empire statecraft, there appears to have been a sense of administrative consensus *between* ruling houses, which was mutually reinforced. For example, the Mongol-Oirat Regulations of 1640, an agreement between competing noble groups, ‘reveal a mutual concern’ (ibid) to maintain the administrative boundaries of *khoshuun* (district) and *aimag* (province) and punish disobedient subjects who abandon their ‘allotted *nutag* (pastoral district)’ (ibid).

When the Mongol nobles submitted to Manchu rule in 1691, Mongol territories were overlaid with a “colonial” administrative structure based on the boundaries – ‘banners’ – of the nobles’ land (Kaplonski, 2010: 639) and expanded the imperial architecture of statecraft again where it had contracted into smaller units with the demise of the Mongol Empire. Under Manchu authority, the boundaries of the *khoshuun* were reformulated into tighter ‘territorial-administrative units’ (Sneath, 2001: 44; Fernandez-Gimenez, 1999: 320). The administrative framework of *khoshuun* was incorporated by Manchu imperialists as a critical mechanism of local governance that enabled the ongoing functioning of the pastoral economy,

reflective of the way that 'pastoralism and the political hierarchy were inextricably combined' (Sneath, 2001: 47). Critically, Kaplonski (2010: 639; Sneath, 2001: 44) notes that these areas were divided into units and sub-units - *soums* and *baghs* - wherein the people were 'divided into commoners and "personal retainers of the nobility."' ¹⁸ While the *khoshuun* reflected formalised boundaries by the Qing administration, customary flexibility was retained in the sense that the boundaries of the *baghs* (sub-districts) were more blurred, depending on the varying pasture needs of the small herding groups of around two to twelve families - *khot ail* - who moved together within the area (Fernandez-Gimenez, 1999: 320; Upton, 2009: 1401).

Sustaining the Aristocratic State: Embedded Economy and Customary Norms

The imposition of Manchu authority was colonial in the sense that it was a foreign power, but the aristocratic 'sub-strata of power' (Sneath, 2007: 4) remained fundamentally undisturbed, particularly in Outer Mongol lands.¹⁹ As Sneath (2006: 17) argues,

The local power relations of aristocracy had all that was required to operate both the local political and economic formations of the khoshuu districts, and the wider Manchu imperial state into which they were later fitted.

Under Manchu rule, customary Mongol law was codified, meaning that the regulation of pastureland and water were gradually brought under the auspices of the Qing Empire's legal system (Kaplonski, 2010: 639). The law of custom and empire allegedly

¹⁸ The institutionalisation of hierarchy within the *baghs* is similar to a governance strategy practiced during the Mongol Empire in conquered Chinese regions where an 'intermediary structure composed of both Mongols and Chinese' was established to maintain control over peasants and those most likely to escape the rule of the administration (Kaplonski, 2010: 639).

¹⁹ In Inner Mongolia leagues were established in addition to the *khoshuun* ruled by the princes, which enabled the top-down rotation of authority designated by the Emperor.

operated side by side under the Qing Dynasty (Fernandez-Gimenez, 1999: 231); it appears that the Manchu authorities had final authority and installed formal dispute settlement mechanisms, but generally allowed pastoralists to maintain customary practice within those formal boundaries. The 'administrative division' (Sneath, 2001: 44) between the Inner and Outer Mongol lands established by the Manchu meant that the Qing Dynasty exercised less direct control over the latter. While each *bagh* (sub-district) had a tax-collector and an administrative office to resolve disputes, it appears that few formal disputes were recorded as the customary 'first-come-first-served law of the steppe' (Fernandez-Gimenez, 1999: 321) continued to prevail regarding campsites (Sneath, 2001: 44).

This is an important observation because it demonstrates the way in which access to institutions of state entailed access to the mode of production: land, animals and pastoral labour. It reflects the way in which the control of state institutions – the nobility – was central to accessing productive processes, to the extent that there was no significant differentiation between the "political" and the "economic." This is evident in the Mongolian term for government – *zasagiin gazar* – which can be understood as the *place* (*gazar*) from where pastoral land is administered (Sneath, 2001: 47). Additionally, it affirms the continuity of adaptive statecraft on the Mongol steppe, even in periods of conquest by foreign powers. The addition of layers of imperialism did not undermine the power per se of Mongol nobles, but resituated it within further layers of governance: the aristocracy was the 'raw material for empire builders' (Sneath, 2006: 18).²⁰ This points to the tenacity of Mongol institutions in the context of changing political milieus,

²⁰ For example, Sneath and Boldbaatar (2006: 298-299) points out that Mongol princes were treated with exemplary regard by the Manchu administration and continued their aristocratic modes of governance despite becoming an auxiliary aspect of the overarching governance strategy of the Qing Empire. See also Di Cosmo, 2006.

and the importance of local institutions in a pastoral society. As the following sections will demonstrate, we can see the ways in which Mongolian state institutions have continued to adapt under new political and economic conditions, despite expressing varying degrees of centralised and decentralised authority (Sneath, 2007: 4). The significant axis of change relates to the state's relationship to the economy, which became increasingly developed as a distinct area of state management following the 1921 socialist revolution. The industrialisation of Mongolia's economy during the period of state socialism laid the foundation for the "liberation" of the market from the direct control of the state during the transition to a market economy in the early 1990s.

However, the fact that herders themselves had 'personal' (if not private) property rights in the livestock (Sneath, 2001) prevented relations of total domination between the nobility and the "common" herder, as the latter were key to wealth creation. In this sense, the labour of herders was not fully alienated from the means of production. The inter-dependency of noble and commoner, reflected in property relations (Sneath, 2007: 17), entailed a position of significance for the nomadic subject. For example, it is debated as to whether princes had the right to alienate land or control land *exclusively* (Fernandez-Gimenez, 1999: 321), as the rights to winter camps and pastures tended to be allocated based on customary use (ibid: 323). Even where princes were granted formal rights to pasture, Sneath (2001: 45; Bawden, 1968: 90-91) notes that customary norms of land use by "commoners" often overrode the Emperor's law in practice as some herders were known to physically resist the arrival of princes claiming their pasture, suggesting that property was viewed as commonly held rather than exclusively held by the nobility (Fernandez-Gimenez, 1999: 323). While the boundaries of *nutag* – the Mongol concept of territory – were enforced by the

nobility, the *nutag* itself as a geographical concept is based on the four customary seasonal pastures required in Mongol pastoral practice (ibid: 321).

In this sense, then, the basic needs of the pastoral economy informed state governance and vice versa. The fact that the governance of pastureland and the mobility of pastoralists was central to the economic viability of early expressions of the Mongol state is an important insight into state-economy relations prior to the formation of the MPR in 1921. The economy was thoroughly integrated into the political system and sustained the aristocratic hierarchy. The economy did not exist in its own right as a “sphere” separate to the state.

While it is not the purpose of this chapter to develop this era of Mongolian history in great detail, it is accurate to say that the pastoral mode of production was intertwined with state formation as opposed to existing prior to it. Customary norms were reinforced by Empire’s power, suggesting that at that time the political, juridical-normative and economic were part of the same social whole. The subject-state dynamic was not The Nomad vs. The Noble, but rather both were imbricated within the aristocratic-pastoral political economy. As Endicott (2012: 44) argues regarding early Mongol history (thirteenth century), responsibility for the nobility, or the Khan, was directly linked to his capacity to ensure ‘that pastureland and water [were] at least sufficient, if not abundant, for his own people.’ Authority to administrate land, water and mobility did not reflect the *ownership* of land (ibid), and the exercise of political authority appears to have been complementary with the requirements of pastoral nomadism. The governance of land, herds and pastoral labour thus perpetuated pastoralism as an embedded economy within Mongol social and state structures, as pastoralism sustained early Mongol polities.

Distinguishing the Economic from the Political: State Socialism, National Industrialisation and Regional Integration in the Soviet Union (1924 – 1990)

Considering Mongolia's history until the beginning of the twentieth century, the conceptual separation of political and economic life under the post-1990 market-democracy model reflects a rapid pace of social change. In the literature on Mongolia's post-socialist transition, scholars emphasise the contrast between the socialist and democratic eras, especially highlighting the shift from a command economy to a deregulated market economy (Orhon, 2003; Rossabi, 2005). The latter binary view creates a false antagonism between the two, obscuring the way in which the socialist state prepared the foundation for market-based capitalist economic development by introducing the concept of labour, currency, surplus value extraction, investment, basic finance (i.e., banks and monetary policy) and industrial production. Rather than a radical break with the past, the marketization of the Mongolian economy since 1990 represents a transformation *within* an industrial model of development, in which the state-economy distinction had already been firmly established.

The socialist period was fundamental in terms of establishing the "economy" as a distinct institution from the political sphere to be governed by the state, a barely recognised legacy of that time. Despite being heavily regulated and under the command of the state, the creation of a separate economic sphere, in which the state acted with increasing displays of a distinctly *economic* rationality (efficiency, competition, profit maximisation), is significant in terms of breaking the pre-socialist conceptual unity between productive and political power. This section will outline the way in which an agrarian-industrial economy was established in outer Mongolia under the tutelage of the Soviet Union and how the country was integrated into a regional market. The creation of

a distinct economic sphere and limited market integration were essential stepping stones for Mongolia's post-1990 economic integration into the global minerals sector.

A Shifting Situation: New Geopolitical Challenges in the Early Twentieth Century

The beginning of the twentieth century intensified the triangular competition for control over and access to Mongol resources and territory between Russia, China and Japan with the rise of nationalist statecraft (Kotkin, 1999: 3; Bawden, 1968/1989).²¹ Mongol territory had been shaped by Qing-Russian border disputes as early as 1727, when the Qing-Russian Treaty of Khatka established the outer boundary of Mongol (Qing) territory. The Qing Empire and Tsarist Russia began to disintegrate in the early years of the twentieth century with the rise of Han nationalism against the authority of the Manchu and the agitation of communist movements in Russia. Sino-Russian rivalry over Mongol territory intensified, as the Chinese began to pursue a policy of sovereign land acquisition and cultural assimilation in this region that had been historically governed under conditions of suzerainty (i.e., tributary relations).

With the decline of the Qing Empire, the policy of the new Chinese authorities shifted from prohibition to promotion of land appropriation (Sneath, 2001: 54) particularly in Inner Mongolia where land was increasingly alienated for permanent agricultural settlements. Under Manchu leadership of the Qing Dynasty, customary Mongol practices of land use required by mobile

²¹ This geopolitical dynamic has ongoing relevance for Mongolian state formation, in relation to China and Russia's competition over access to Mongolian mineral resources in the early twenty-first century. One historian, Stephen Kotkin (1999, 17), emphasises that, 'Mongol history, for better or worse, is Russian history and it is Chinese history.' At the same time, he argues that such a recognition 'must not degenerate into a one-way search for the influence of outsiders on the Mongols.' As B. Baabar (1989/2010: 1037), arguably Mongolia's most famous living historian, stated vehemently in *Buu Mart*: 'Whether in Moscow or Beijing, let there never be a fashion to share jokes about a dying tribe called the Mongols!'

pastoralism had been generally respected. As Sneath notes (2001: 51), 'Mongolians had occupied a relatively privileged place in the social order.' However, the emergence of Han Chinese nationalism changed this "soft" approach to the governance of territory. In particular, the scale of land appropriation – 'land booms' (Sneath, 2001: 52) – by the Han-Manchu elites sparked a *revolutionary* reaction from Mongols. Lan (1999: 50) notes that 'the Mongols demonstrated their opposition openly and repeatedly against the New Administration': 'creating Chinese administrative units, reducing the power of banner *jasags* (i.e., the power of the Mongol nobility and monasteries), and replacing Mongolian garrisons with Chinese troops' along the border with Russia. Despite intense resistance and armed revolts in Inner Mongolia,²² the enclosure of land for cultivation was carried out under Manchu military coercion. In part, according to Lan (ibid: 53), the inefficacy of resistance in Inner Mongol territory was due to the lack of unity between the Mongol aristocracy:

Most of their ruling princes were already partly sinicised and some of the Inner Mongolian princes approved the New Administration.

Observing the loss of relative autonomy and the violent disruption of the pastoral economy in Inner Mongolia, a more coordinated and unified group in Outer Mongolia sought to cut off their 'alliance' (ibid: 52) with the Qing Empire by seeking Russian support.

Owen Lattimore (1934: 126 quoted in Sneath, 2001: 51) observed that 'the futility of mere resistance as a method of preserving the integrity of Mongol territory and Mongol people' led to the formation of an armed separatist movement in the Outer Mongol

²² Strategies deployed included both indirect and direct forms of resistance: signing petitions, impeding land surveys, refusing to pay contract fees and land taxes, armed attacks on Chinese officials and the raiding of Chinese local governments (Lan, 1999: 49).

lands. For Mongols in the Inner Mongol area of the old Qing Dynasty, the new Han authorities 'standardized' (Sneath, 2001: 52) what was once a semi-autonomous region (*amban*) of the Empire into a closely administered province of the Chinese state. The 'assimilationist' (ibid) approach of the new Chinese state was instrumental in the development of a Mongol nation-state in the Outer Mongol lands and the claiming of *Mongolian* national identity. Lattimore (ibid) poignantly remarks that it was at this point in history that Mongol leaders recognised 'the fact that independence cannot be maintained without the creation of social forms adequate to the life of a modern nation in a modern world.' Thus, while mobile pastoralism has been shown to be 'inextricably combined' (Sneath, 2001: 47) with the constitution of political authority and economy in Inner Asia, the establishment of a national, territorial state in response to the imperial expansionism of the Chinese state implied significant discontinuities in the administration of nomadic pastoralism. Specifically, the 'broad strata of authority' (Nisbet, 1974: 612) typifying the space between the nomadic subject and the sovereign which had enabled far more fluid boundaries collapsed as the state became defined by *national* borders.

As the Qing Dynasty was steadily transformed into a Han nationalist state (Sneath, 2001: 49-53), the Mongol separatists faced the dilemma of safeguarding the Outer Mongol region from Chinese acquisition, as well as preventing Japanese economic interests and Russian warlords from threatening new forms of colonisation (ibid: 53). The Chinese threat at that time was the most pressing.²³ A group of Mongol princes and senior Buddhist lamas organised a secret delegation to Russia to ask for

²³ In 1907, a Department of Colonisation was established in Beijing to enable the export of Han Chinese to Mongol territories and permit the acquisition of land (Kotkin and Elleman, 1999: 30). In 1911, the level of threat was heightened with the establishment of a 'colonisation bureau' (ibid) in Ulaanbaatar.

protection and assistance in July 1911 (Tatsuo, 1999: 71-72). There appears to have been no clear consensus about which form this assistance was to take, as some of the princes wanted independence from the Chinese and others wanted a restoration of their previous position within the Qing Empire. Fundamentally, Russian assistance was invited to prevent the New Administration but did not necessarily entail becoming a protectorate of Russia nor achieving full national independence in the minds of the Mongol drafters (ibid). In the letter delivered by the delegation to the Russian government, the perspective of the Mongol delegation was that they were no longer able to submit to the Manchu Emperor as they had peacefully done for 200 years, because of the new Qing policies of land appropriation, blaming the "Han Chinese bureaucrats" for taking political power and bringing "confusion and discord to the affairs of the state" (Khalka Delegation Letter, 1911 quoted in ibid: 72). According to Tatsuo's translation (ibid: 73),

the letter pointed out, "we cannot bear" the new policy of government, which was designed to "search out ways to turn Mongol land into farmland, which, if accomplished, will inevitably destroy our traditional way of life."

The emphasis of the delegation was upon preserving 'peace and tranquillity' and, above all, 'our traditional way of life' (ibid); it appears to have been more of a request for guaranteeing political space and the boundaries of a place in which the Mongol state (aristocratic and religious institutions) and society (nomadic) could continue. Between 1912 and 1921, a bargain was struck between Russia, Outer Mongolia and China whereby Russia would support the establishment of an autonomous Outer Mongolian region under Chinese suzerainty, led by the Mongol religious and political leader known as the Bogd Khan (ibid: 75; Bawden,

1968/1989). However, this set-up proved to be too weak to protect Mongolia from its southern neighbour. In 1918, the Chinese army returned 'to prevent Soviet aggression feared from the north' (Bawden, 1968/1989: 202), which led to the complete reinstatement of Chinese authority in 1920 in what Bawden (ibid) has described as 'humiliating circumstances' for the Mongols.

While there is neither space nor necessity to cover this period of Mongolian state history in more detail, it must be said that this was a complex political moment for the Mongols. While Russia was clearly the preferred option to China, it is not equally clear that the Mongol revolutionaries were particularly inspired by Leninist-Marxism, apart from a few notable leaders such as Sukhbaatar and Choibalsen who have, in hindsight, been credited as the most influential actors on the revolutionary process. The narrative that emphasises these individuals' commitment to socialist ideology obscures the lack of unity within the revolutionary leadership, between 'rightist' nationalists who prioritised Mongolian independence and 'leftist' revolutionaries who allegedly prioritised the wholesale "emancipation" of Mongolia from not only China but aristocratic-religious "feudalism" (see Bawden, 1968/1989: 277).

Between 1921 and 1923, the Red Army drove out the Chinese and "White" Russians, and established sufficient territoriality to declare Mongolia an independent state. Rather than immediately socialising Mongolia's only means of production – livestock – the new Mongolian state initially encouraged a form of managed capitalism in line with Lenin's New Economic Policy to boost economic recovery. In 1924, the Mongol State Bank was established, with the *tugrig* as the national currency. Interestingly, some currency speculation was permitted at this time and commercial transactions were taking place without significant interference from the state (ibid: 274). Mongolia's

limited industry (a handful of factories) and services sector was primarily driven by foreign companies; Mongols themselves were primarily occupied in the pastoral sector. While Mongolia's socialist transition was narrated later by socialist historians – Mongolian and Russian – as a triumph of the peasant over the feudal lord, the historical reality suggests a much more complex and violent picture, driven by geopolitical necessity.

Socialist Constitutionalism: New Institutions and Revolutionary Legality for the Mongol People's Republic

In 1920, D. Sukhbaatar and a small group of revolutionary Mongol leaders sought the assistance of the Red Army in securing the borders of the Outer Mongol territories and established a revolutionary government that operated through a compact with the Bogd Khan, the presiding Buddhist suzerain (Butler & Nathanson, 1982: 174). After the Bogd Khan's death in 1924, the new Mongolian Peoples' Republic no longer required a compromise with the religious establishment and declared its independence as an aligned state of the Soviet Union, following the successful demarcation of its southern border with China. While the MPR maintained its formal independence from the Soviet Union, the group of revolutionary leaders adopted Leninist socialism as the governing ideology of the new Mongolian nation-state. Caroline Humphrey (1978: 139), an eminent Mongolist, explains that it is essential to 'take into consideration the political position of Mongolia as a nation-state' following the declaration of its "independence" in 1921:

Neither China nor the Soviet Union were going to follow a Mongolian policy. The Mongols had to decide which of their two neighbours offered the best prospects as protector and they then had no option but to act as an ally, loyal not only in foreign affairs but

also as a true follower of the ideology and social reconstruction.

The introduction of Buddhism as an imperial religion had ultimately reinforced the cohesiveness of aristocratic socio-political order by perpetuating the 'intertwined' ethno-linguistic and political-religious discourses that had come to define the 'conception of political unity' between Mongol people and early Mongol statecraft (Munkh-Erdene, 2006: 55-57). Consequently, for the purposes of the more radical socialist revolutionaries, the destruction of the Buddhist church was seen as the key to the establishment of the socialist state. This was not only because Buddhism challenged socialism as a competing ideology, despite initial attempts to accommodate both (Bawden, 1968/1989: 264-273), but because of the economic power vested in the lamaseries. While the new established Mongolian People's Revolutionary Party (MPRP) had Soviet backing, the clergy outflanked the new political leadership both in terms of numbers and distribution throughout the country. According to Kaplonski (2011: 434), there were initially only 100-150 party members against 80,000-100,000 lamas, and the party members were mostly based in the capital city. Furthermore, the indigenisation of Buddhism among Mongols and the entrenched nature of the aristocratic-clerical order meant that ordinary Mongols, particularly outside of Ulaanbaatar, were deeply resistant to the destruction of clerical institutions.

The death of the Bogd Khan provided a political opening for the adoption of socialist institutions (1924 Constitution of the Mongolian People's Republic, Annex 1). In 1924, Mongolia adopted its first socialist constitution that called for the reorganisation of political and economic power in the name of the 'labouring people' (ibid). Compared to later constitutions, this initial constitution bears limited resemblance to its Soviet

counterpart and is more nationalist in its language than socialist: ‘the unified economic policy is in the hand of the Government’ (Article 3d). While the Constitution contextualises its ‘Declaration of the Rights of Labouring People’ with the acknowledgement that ‘the labouring masses of the whole world are striving to uproot capitalism and to attain socialism’ (Article 3n), this internationalist statement is immediately followed by a nationalist ‘Note’:

Nevertheless, as circumstances may demand, the possibility of entering into friendly relations with diverse foreign Powers is not excluded, provided, however, that any attempt against the independence of the Mongolian People’s Republic shall meet with decisive resistance in all circumstances.

In fact, the text of the 1924 Constitution clearly reflects a Mongolian *national* adaptation of socialism. Private property in livestock was still permitted, while property in land, minerals, forests and waters were common property (Article 3a). The role of the state in relation to the economy had more a regulatory character than a completely socialised one,²⁴ based on the fact that the basis of the new national economy – livestock – was personally owned. There was little surplus value to extract from herding, given that it had not been organised in a way to generate economic growth or maximise surplus value. Thus, while the ‘first real object of the Mongol Republic consists in the abolition of the remains of the feudal theocratic order’ (Article 2), consensus was initially absent as to the precise manner in which the new notion

²⁴ In Article 5 of the 1924 Constitution, the attributes of the ‘supreme organs of the Mongol People’s Republic’ included raising foreign and domestic loans (5a), to regulate foreign and domestic trade (5d), public economic planning (5e), to approve the Republic’s budget and establish taxes and revenues (5h), to organise currency and credit (5i), and to ‘establish the general principles of the use of land,’ define provincial boundaries, and ‘regulate the exploitation of mineral wealth, forests,’ etc (5j).

of a national economy should be governed, although that quickly changed.

Developing a socialist legal system and institutional base was a critical step in consolidating the new state. Within the first ten years of the MPR's formation, 'revolutionary-democratic law and its system were fundamentally formed and established' (Dashniam, 1974 in Butler & Nathanson, 1982: 167). Statutes mandating and governing the establishment of state agencies, judicial institutions, central and local *khurals* (parliaments) were enforced, and legislation passed in the areas of labor, family, criminal, and civil law. Similar to the 1924 Constitution, 'revolutionary-democratic law' (ibid) has been portrayed by Mongol socialist legal scholars as an intermediary between the rejection of 'feudal and capitalist law' and 'socialist law' (ibid: 168). It was rationalised as an 'embodiment in law of the aspirations of socially progressive and revolutionary classes' (ibid: 168) and to make socialist social relations normative:

Revolutionary-democratic law played a vital role in developing the forces of production, in providing citizens' needs, in educating workers with revolutionary ideology, in the struggle by people against remnants of the past, in respecting and observing revolutionary legality, and in strengthening new labour discipline (ibid: 169).

A critical part of establishing the MPR as a socialist, Soviet Union-aligned state was the dissolution of the monasteries and the purging of political dissent from the clerical class (Kaplonski, 2012). As Kaplonski argues, the 'question of the lamas' (ibid: 72-73) reflected a fundamentally political, as opposed to religious, conflict between the new socialist government and the Buddhist establishment. The Buddhist church not only had a strong legitimacy in Mongol society based on the fervent religiosity of

the population, but through their central role in 'economics, livestock, education and healthcare' (ibid: 73). Consequently, the lamaseries posed a fundamental threat and roadblock to the strategic interests of the new socialist state. Supported by Moscow and the Red Army, the socialist political leadership took drastic action to dissolve clerical power and institutions in the late 1930s, following a decade of efforts to undermine them through taxation, incentives, prohibitions and prosecutions (ibid: 74). Significantly, Kaplonski argues that the failure of these methods in the 1920s and early 1930s created the conditions for the use of brutal force by the state, which would have been delegitimised if exercised earlier by a 'contingent'²⁵ (ibid) state which had yet to consolidate its sovereignty over the Mongolian population. Between 1937 and 1939, approximately 18,000 lamas were purged by national and Soviet armed forces, and virtually all of the lamaseries (700) were destroyed (ibid: 73).

The destruction of the Buddhist establishment enabled the MPR to consolidate its modernist and secular programme of development. Productivity, modernisation and nationalism were the core impetus of the new state ideology. Notably, there was, despite this rhetoric, some overlap between "feudal" and "revolutionary" legal norms in the early period of the socialist state, which arguably reflects the new state's need to borrow legitimacy from the previous order. However, the inclusion of some norms from 'feudal legislation' (ibid) was justified in hindsight by socialist legal scholars: 'the utilisation of old legal norms meant putting new meanings into old forms of law, and... destroying these laws from within' (ibid).

²⁵ Kaplonski (2012: 74) describes the MPR in the 1920s and 1930s as a 'contingent state,' a phrase he argues is a 'useful shorthand to argue that socialist Mongolia was not a well-established, uncontested state widely recognised as legitimate by the majority of the population.'

The MPR's trajectory of constitutional development was to become consistently more aligned with that of the Soviet Union. Following the disastrous first attempts at collectivisation, as will be discussed later, it was not until 1940 that Mongolia was 'formally committed' to a "non-capitalist development path" (Butler & Nathanson, 1982: 176) when the 1940 Constitution made an explicit commitment to state planning (ibid).²⁶ By 1960, Mongolia was fully committed to socialist state forms and Marxist-Leninist ideology; the latter was described as 'all triumphant' in the preamble of the 1960 Constitution (1960 Constitution printed in Butler & Nathanson, 1982: 179-193), with Labour Power as the driving force of socialist accumulation strategies.

Institutions of "democratic centralism" were established, with clear distributions of administrative responsibility and subsidiarity between central and provincial administrations. In particular, the provincial, district and sub-district *khurals* and executive offices were charged with specific responsibilities in political and economic management. Article 55 obligated these sub-central administrations to:

*Direct economic and cultural political construction on
[its] territory;*

*Direct and control the work of economic and
cooperative organisations;*

*Confirm the economic plan and local budget; take
measures to fulfil them;*

²⁶ The MPR continued to adapt some aspects of Soviet constitutionalism in ways that indicate a "softer" mode of authoritarianism. For example, the Soviet provision "he who does not work, neither does he eat" (Article 12) was interpreted more positively in the Mongolian constitution as 'honest and conscientious labour is the basis of the development of the national economy' (Hazard, 1948: 164).

Direct the activity of agencies of administration subordinate to them;

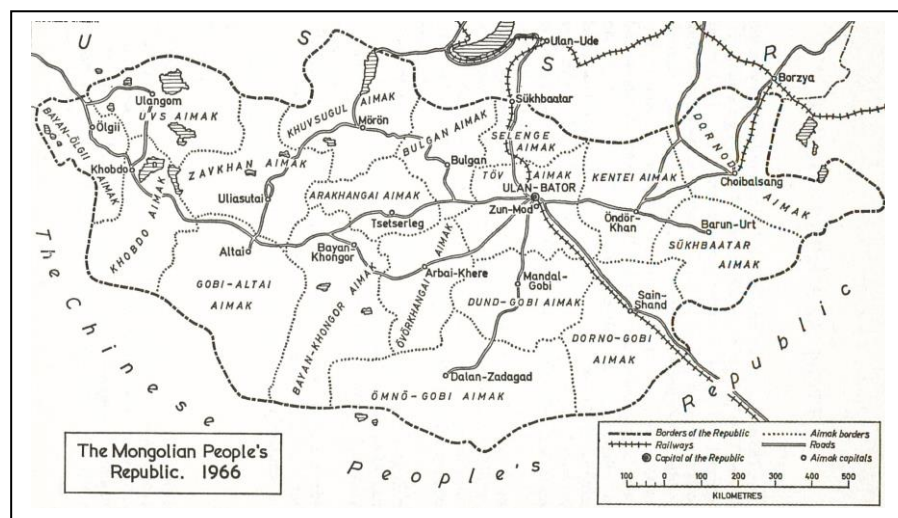
Ensure observance of the rule of socialist community life, protect the rights and interests of state enterprises and institutions, agricultural associations, and other cooperatives, and also protect the rights of citizens;

Ensure the precise observance of laws, and also the strict fulfilment of decisions of superior agencies;

Ensure the extensive and active participation of the working people in all domains of state, economic and cultural construction.

Clearly, the state had formed the institutions and legal-normative framework to execute and legitimise a specifically socialist regime of accumulation. However, how was an “economy” to be actually formed out of the aristocratic-pastoralist entanglement? How were herders to be made into a “productive” labour force? These questions, crucial to understanding the socialist political economy and the role of the state therein, will be examined in the following section.

Map Five: The Mongol People’s Republic in 1966 (Source: Bawden, 1968: 449)



Introducing “Economic Development” into Mongol Steppe Society

Unlike other polities where pastoralism was practiced alongside other forms of production, pastoralism *was* the only basis of what could be described as a “national economy” in the MPR, as most Mongols within the newly established borders were herders (Humphrey, 1978: 139). According to Humphrey (ibid), this unique position ‘lent distinction to the Mongolian socialist revolution.’ It also generated conflict between the revolutionaries about the new Republic’s pathway towards economic development, as there was no prior state of capitalism for the “proletariat” to rise up against. In fact, as Bawden (1968/1989: 244) puts it,

There was no working class, and no native capitalist class either, for though there were recognisable groups within the populations these did not coincide with social classes in the Marxist sense. Divisions were vertical rather than horizontal. It was the work of years to engineer class consciousness and a class struggle. Delegates to the important Third Party Congress in 1924 to lay down the lines on which the new republic was to develop, were confused by talk of classes. As one of them put it: “Whom are we to consider as capitalists, as middle herdsman and as poor herdsman? And how are we to distinguish them?”

The vertical divisions that structured the relative hierarchies of the aristocratic-clerical social order gave it a particularly tenacious character because its inequalities were so layered that they did not produce resistance to the whole order per se. While there were inequalities in decision-making power and clear hierarchies of status between the nobility and the ‘common’ people, the dependency of the whole political system upon livestock herding gave herders economic self-sufficiency and

autonomy to operate within the boundaries of the ruling house. Livestock was also not alienated from the herder; systems of personal ownership were operative within the 'jurisdiction of the local political authority that regulated their use' (Sneath, 2001: 43).

The MPRP was faced with the unforeseen challenge of turning herders into an industrial labour force. By the end of the 1920s, however, the MPRP had articulated a strategy for reorganising production (Boikova, 1999: 107) in conjunction with the Soviet Union. The 1929 Soviet-Mongolian Agreement 'stated that the working people of Mongolia had made a decision on the non-capitalist development of their country by promoting their own industry, enlarging and further developing their own cattle-breeding and agriculture, collectivising agriculture, developing cooperative and state trade,²⁷ and having the government regulate the economy' (ibid: 108). Part of the legitimising narrative of the socialist reformers was a critique of pre-socialist "feudalism" where nobles and clerics were framed as holders of private property at the expense of the 'exploited class' of *arat* (commoner) (Dashniam, 1974 in Butler & Nathanson, 1977: 168; Mönkhjargal, 1977 in Butler & Nathanson, 1982: 499;). In the words of a socialist Mongol legal scholar, T. Monkhjargal (ibid), 'an important factor in developing a non-capitalist path was liquidating the economic power of the feudal class and forcing foreign exploitative capital out of the nation's economy.'

In reality, the "working people of Mongolia" were uninformed about the intention to "socialise" the means of production (i.e., livestock), as the MPRP in Ulaanbaatar operated apart from the majority of the rural Mongol population. Consequently, the first

²⁷ As Boikova (1999: 109) accurately points out, the Agreement also essentially gave the Soviet Union monopoly access to economic relationships with Mongolia by granting the Soviet Union Most-Favoured Nation status, reinforced by the clause stating that 'the exceptional privileges which the USSR and Mongolia granted to each other should not be applied to other countries.'

phase of collectivisation of the herds (1929-1932) was a complete disaster. As Lattimore (1949: xxxvi-xxxvii) observed,

The attempted forced march toward socialisation and collectivisation frightened and antagonised the herdsmen who formed the main bulk of the population and who owned its chief economic resource, the flocks and herds. They regarded collectivisation not as a new form of ownership but as deprivation of ownership, and in resistance to it they slaughtered their cattle by the thousand. The whole attempt had to be abandoned, and the country returned to private ownership of livestock, modified by a strong emphasis on cooperative enterprises of all kinds as a means of turning the minds of the people toward the potential advantages of group enterprise in contrast with sole reliance on the enterprise of the individual or the household.

Initial collectivisation was a failure because the anti-feudal premise of the endeavour was miscalculated: the aristocratic-clerical order was hierarchical but property was not fundamentally alienated from the “commoner.” Land was organised on the basis of personal use-rights within a custodial framework (Sneath, 2001: 43) rather than *private* property rights, and herders owned their own livestock. Thus, given that they were owners of Mongolia’s sole “means of production,” herders were able to resist collectivisation unlike other pastoralists in the Soviet Union. The Party soon realised that by sending herds over the border into China or slaughtering them, herders had the power to ‘deplete the country’s productive capital’ (Dupuy and Blanchard, 1970: 299). Many animals also died due to a lack of a sense of ownership and responsibility in the newly formed collectives. Between 1930 and 1932, the number of livestock dropped dramatically from 24 million to 16.2 million (Endicott,

2012: 68). Following this initial failure to immediately collectivise the herders, it was acknowledged that completely skipping the capitalist phase of development had been idealistic. The New Turn Policy, instigated to repair the political and economic fallout from forced collectivisation, can be understood as an 'ideological retreat from socialism in that it was publicly admitted that only by fostering private enterprise could prosperity and confidence be restored. The new motto was "raise high private initiative, and bring the private cattle-herding economy to a new level"' (Bawden, 1968/1989: 352).

Specific steps were taken in order to transform the herding population into an organised force of labour and to 'rationalise' (Bawden, 1968/1989: 310) production so that surplus value could be generated and extracted to increase the yield of the economy and sustain the new nation-state. Industrial development was now dependent upon diverse capital inputs, whereas previously 'livestock represented both capital and income as well as a measure of wealth, a medium of exchange, and almost the only source of food, clothing and shelter' (Dupuy and Blanchard, 1970: 297). In a limited sense, the socialist period introduced a capitalistic economy by organising production in a way intended to 'generate the expansion of capital' (Cox, 1987: 57) albeit for the purposes of the state. This was a gradual process of incorporating herders into the logic of industrial production. Until the 1950s, herders were simply encouraged to pool their labour and increasing levels of support were granted to herders to incentivise them to work together and increase their "industrial" outputs of wool, meat, and dairy products. The state enabled this process by providing tax incentives and tangible support to herders, such as repairing winter sheds and providing Soviet-purchase machines to assist with haymaking. A compromise was also struck by granting nomads permission to have some private livestock in the context of the *negdel*. By the

early 1960s, the majority of herders had been incorporated into *negdels*, reflecting both a change in social mind-set and the reality of ‘propaganda and economic compulsion’ (Bawden, 1968/1989: 399).

The modernising impetus of the socialist state cannot be understated. Writing in 1970, Dupuy and Blanchard (ibid: V) explained that ‘one goal constantly preached is the conversion “from an agricultural-industrial society to an industrial-agricultural state” – by which is meant the eventual dominance of industry over stockraising.’ The desire to collectivise the herds and ‘rationalise’ pastoral production was part of a broader vision of gradually creating a sedentary “modern” workforce primarily engaged in factory production. In the 1960s and 70s, the livestock collectives (*negdels*) modelled an almost Fordist division of labour, with specialised tasks assigned to different groups of herders, who had formerly attended to all aspects of the production process prior to collectivisation. In a similar way, herds were also “specialised” into one type of livestock rather than the customary five-animal herds (i.e., sheep, goats, camels, horses, cows) (Endicott, 2012: 73). As Endicott (ibid) notes, the *negdels* were given specific ‘production goals’ under the Five-Year Development Plans, adding that ‘this external source of authority reduced herders to state employees without much scope for independent decision-making vis-à-vis pasture use.’ Land, however, remained public: unfenced and uncommodified, as the *negdels* still depended on nomadism, although now under bureaucratic supervision (ibid: 78-79). Humphreys (1978: 156) also observed that the herding collectives tended to reflect the pre-socialist territories of the *khoshuun*, as ‘many *negdel* centres were on the sites of disbanded lamaseries.’ Thus, despite huge change, there were elements of continuity with aristocratic forms

of statecraft in the governance of pastoralism and territory in the socialist period.

The state also introduced specific legal forms to enhance productivity as national development accelerated, which reinforced the formation of an economic sphere distinguished from but governed explicitly by the state. A good example of introducing distinctly *economic* legality was the case of economic contracts, which were ‘especially influential and significant in perfecting economic relations’ (Mönkhjargal, 1977 in Butler & Nathanson, 1982: 499), according to a socialist jurist of the time. In 1961, the General Conditions for Economic Contracts were introduced by the Council of Ministers. Economic contracts had a ‘planned character’ (Aiuush, 1976 in Butler & Nathanson, 1982: 498) in the sense that ‘the money-commodity relationship’ (ibid: 497) was planned, but they created the possibility of private (i.e., non-state) economic exchanges and added another layer of distance between direct state control and the productive sphere. As Aiuush (ibid: 498) puts it,

Capitalist theorists consider that contracts during the period of socialism are the technical instrument of planning. This denies the independent and increasing role of contracts... Planning is one way to provide the national economy with unified guidance by the state, and economic contracts are one way to develop the initiative of economic organisations.

This quote from Aiuush, a Mongol socialist jurist, reflects a blurred boundary between socialist and capitalist economic governance in the late socialist period. From Aiuush’s perspective, contracts enable some *private freedom* in the economic sphere and have efficiency-enhancing utility, which runs counter to classical socialist economic theory. Although the adoption of a (private) legal form to enhance productivity and

initiative is intuitively *capitalist*, it was in fact planted firmly within socialist rationality: 'In order to perfect socialist economic relations the role of legal coordination must constantly increase' (Aiuush, 1976b: 501). Within the first five years of planning, the number of economic contracts increased by fifteen times (ibid), demonstrating the incorporation of capitalist legality within a socialist framework to enhance accumulation.

By 1970, approximately 60% of the population were still employed in livestock herding (Dupuy and Blanchard, 1970: 308). However, by the end of the 1980s, that number had declined to under 20% (Fratkin and Mearns, 2003: 117), following heightened industrial development of the 1960s and 70s (Bumaa, 2001: 54). This remarkable social shift from a "simple" pastoralist mode of production in the 1920s to a mixed economy controlled by the state (manufacturing, agriculture and mining) was a product of the centralisation of state power. After 1948, following the disastrous first effort at collectivisation, the purges of "dissidents" and clerics, and the second world war, the MPRP began to produce Five Year Plans, following Soviet development models. This heightened developmentalism was enabled by a deepening aid and trade relationship with the Soviet Union in the 1950s (ibid: 293), with large-scale exports of manufacturing equipment and personnel to the MPR. The Soviets had an interest in maintaining Mongolia as an effective buffer state, and therefore were willing to invest in the country's self-sufficiency.

The Soviet Union was also the primary beneficiary of Mongolian industrial development, having a monopoly on its foreign trade. Mongolia exported mostly raw commodities to the Soviet Union (i.e., copper, coal, meat, dairy products and wool) in exchange for processed imports. In terms of economic and social outcomes, the Soviet era of Mongolian history caused a remarkable shift in Mongolian society. In 1978, Humphreys (1978: 158) wrote that

Mongolia had one of the highest standards of living in Asia, as the country was virtually self-sufficient in terms of food production. Pastoral products such as meat and wool were exported to market on the Soviet trading bloc – the Council for Mutual Economic Assistance (CMEA) – and the discovery of copper deposits near Erdenet led to the establishment of a state-owned copper mine. Mass education was enforced and widespread literacy was achieved; the children of herders were sent to boarding schools in the urban centres of *aimags* to learn new herding techniques or other skills (ibid: 145). According to Humphreys (ibid: 149), the dominant perception of nomadic pastoralists under Soviet socialism was that they were ‘unsystematic,’ ‘inefficient’ and ‘idle.’ The explicit intent of collectivisation and mass education was to instil an industrial work ethic into Mongolians (ibid).

Mining minerals to export to Russia became a significant portion of industrial production in the late socialist period. In 1978, a Russian-Mongolian joint venture in copper extraction began operations in Erdenet, a small urban centre north of Ulaanbaatar. The Nailaikh coal mine on the outskirts of Ulaanbaatar was similarly a stalwart of coal production at the time. The industry was tightly controlled, mainly exploited by joint venture projects with Russia, and served domestic consumption and Soviet demand. Prices were fixed by the state, with preferential purchasing rates for the Soviet Union. While this might have changed if the Soviet Union had not collapsed, mining remained a relatively small focus in Mongolia, although geological mapping was undertaken for future exploitation and was part of an overall evaluation of Mongolia’s productive assets. Notably, these maps provided the basis for the “minerals rush” in the mid-late 1990s in the wake of the liberalisation of the economy. The introduction of private property interests in land through extractive industries was thus avoided at this time, as the state alone had the right to

explore and extract minerals. Copper ore became Mongolia's most lucrative export from the 1970s onwards (Goyal, 1999: 634).

As indicated in the section on socialist constitutionalism, the ability of the state to effectively extract surplus value and “develop” the economy was critically enabled by local government branches, which were key loci to teach ‘Communist industrial discipline’ to former nomads (Dupuy and Blanchard, 1970: 294). The sheer scale of Mongolian territory and the challenge of governing a remote population required the systematic diffusion of central authority through administrative sub-divisions. Just as the Qing rulers had overlaid customary boundaries established within the Mongol Empire with the *khoshuun*, the socialist political engineers in Ulaanbaatar and Moscow also chose an adaptive regulatory strategy, to some extent a ‘new formulation of earlier political relations’ (Sneath, 2001: 47). While they reconfigured the boundaries of the provinces (*aimags*) and established new districts (*soums*) in line with the administrative requirements of new industry (i.e., the *negdels*) (Endicott, 2012: 74), they capitalised on the cultural inheritance of Mongolian familiarity with local institutions as a means of achieving state national goals. While the socialist state was unitary, elections were held at district and provincial levels, although in reality these “elections” were political appointments.

To conclude this section, the period of socialist state formation evidences significant continuities and discontinuities with the pre-socialist era of Mongol statecraft. The central aspect of socialist statecraft in Mongolia in political-economic terms was related to the governance of labour and livestock; similarly, pastoralism was at the heart of pre-socialist state forms. However, the governance of pastoralism in the socialist period was no longer an end in itself, but a means to industrial development. Livestock was commodified as a capital asset for

the state in the name of the “people,” and the work of the new socialist subjects was converted into a pool of *labour*, organised to enable industrial production (although it was not subordinated to a free market system of price-based supply and demand). However, despite the introduction of a distinctively *economic* rationality within the state, it was contained within the political discourse of Soviet socialism. While we could describe the pre-socialist era as a completely politicised economy – with production and statecraft ‘intertwined’ to use Munkh-Erdene’s phrase (2006: 56) – the socialist state was a loosened braid, in the sense that the political-institutional and economic production became two distinctive fields of social life. However, economic production was still embedded *within* the political sphere, as the government actively organised trade, exchange and price values.

Democratising the Government, Depoliticising the Economy? The Post-Socialist Mongolian State

Surprisingly, Mongolia’s democratic revolution in 1990 has many parallels with its socialist counterpart. Just as the socialist revolution began in Ulaanbaatar in the wake of the collapsing Qing Empire, Mongolia’s democratic revolution was initiated by young, urban and predominantly male Mongolians as the Soviet Union crumbled at the end of the 1980s. The democratisation of the Mongolian state occurred in similar conditions of emergency,²⁸ where the ‘rules of the game’ (Swyngedouw, 2005:

²⁸ From 1990-1992, the purchasing power of consumers diminished severely with annual inflation rates leaping to 325.2% in 1992. Unemployment compounded the capacity of most Mongolians to afford basic provisions as it rose from 1.3% in 1989 to around 20% by 1994 (World Bank, 1996: v). Government spending on social welfare declined rapidly during Mongolia’s transition to a market democracy, from 40% of government expenditure before the transition to 11.1% of GDP in 1993 (ADB, 2008: 1-2). Under the Soviet-style command economy, Mongolians had enjoyed universal health care, employment, education and pension schemes, in addition to the provision of benefits to vulnerable groups (ibid). Following the market transition, real expenditure on health was reduced 46% from 1990 to 1992 and the education budget was reduced by 56% (Sneath, 2006b: 149-150). The sudden decline in living standards combined with the cash poverty of most Mongolians resulted in rising levels of inequality: the earliest Gini coefficient data shows an increase

1991) fundamentally shifted with the hegemonic rise of self-regulating market capitalism and the demise of alternatives (i.e., the Soviet Union). Once again, Mongolia needed to politically re-orient itself in order to survive economically without Soviet assistance or access to its regional market, as well as to maintain its independence, thereby facing the same geopolitical predicament of asymmetrical relationships with its neighbours. The social violence accompanying this period of revolution, however, was economic rather than political. While the revolution was peaceful in the sense that there were no outbreaks of physical violence, the majority of the Mongolian population endured a seismic shift in their social environment, as the economy was forcibly rent from direct state control.

(Re)Constitutionalisation Part I: A New Blueprint for Accumulation

The measures that constitute shock therapy do not by themselves create 'agonizing pain' in the body politic. The image of plummeting living standards as a result of rapid economic reforms is completely wrong-headed...

– Jeffrey Sachs in 'Understanding Shock Therapy' (1994: 25)

Mongolia's path to nation-state status had depended in large degree upon the Soviet Union. When the latter began to crumble in the late 1980s, so did the bulwark of aid, trade support and investment that had enabled the Mongolian economy to industrialise. Similar to the early 1920s, maintaining Mongolian independence required a new orientation to prevent re-

from 0.31 in 1995 to 0.35 in 1998 (ibid). The lack of available data from the Soviet era and the early years of the transition makes the original levels of pre-transition inequality levels difficult to determine in terms of the Gini coefficient, but they were generally considered to be low. See Rossabi, 2005: 35.

colonisation by China, with which Mongolia had maintained a tense and fragile relationship. The demise of the Soviet Union ushered in an era of Western hegemony, laden with “End of History” optimism about the future of market democracy. Mongolia was one of many post-socialist states in Central Asia and Eastern Europe caught up in waves of local and global optimism about the transformative power of liberal institutions to effectively mediate the political and economic spheres: separation of powers doctrine, constitutional democracy, private enterprise and (the liberal version of) the rule of law.²⁹

Mongolia’s democratic revolution was driven by both pragmatic necessity and ideological fervour, similar to its socialist predecessor. Led politically by young idealists caught up in the narrative of *openness* in the late 1980s (following the movements for *perestroika* and *glasnost* in the Soviet Union), the post-socialist transition was also pushed hastily along by forces of economic crisis. Educated in Russian and Eastern European universities, the young, urban and elite leaders of the reform movement had been exposed in varying degrees to the principles of multi-party elections, democracy and the market economy (Rossabi, 2005: 4-5). The young Mongolians who lead the democratic revolution did not topple socialist party rule, but managed to erode its monopoly on power through the introduction of multi-party elections and the removal of hard-line members of the MPRP. The MPRP won the first democratic election in 1990 because of the failure of the democratic reform movement to adequately reach out to the rural electorate. However, the MPRP tactically offered some leadership positions to the democratic reformers, allowing a peaceful transition to multi-party elections. A strong contingent of the

²⁹ The rule of law is a contested concept, but at its most basic refers to the universal application of fairly drafted and defined laws, as opposed to arbitrary exercises of power. In liberal legal theory, which plays the strongest role in terms of affecting global rule of law norms (Jayasuriya, 2001), the rule of law is explicitly associated with the protection of private property rights (May, 2014: 68; 2014b).

reform group, led by D. Ganbold and others known as the “Club of Young Economists” (Fritz, 2008: 771), were inspired by the ‘creative destruction’ (Harvey, 2005b: 23) model of the neoliberal Washington Consensus (ibid: 27; Klein, 2007: 155-170), where a minimally-involved government facilitates a rapid transition to a market economy through privatisation and economic liberalisation. The new leaders of the MPRP following the July 1990 elections were more moderate and somewhat conciliatory towards the reformers; the first democratically elected Prime Minister offered Ganbold the influential cabinet role as First Deputy Premier (Rossabi, 2005: 28).

The “new” government of the democratic Mongolia that emerged in the wake of a crumbling Soviet Union was a genuine ideological hybrid, comprised of both the MPRP and the new democratic parties, the more powerful of which advocated a hasty transition to a market-economy in line with the advice of International Financial Institutions (IFIs). The political leadership of Mongolia did not have much time to work through their differences or come to a compromise as the collapse of the Soviet Union precipitated an economic crisis that required hasty political realignment. The sudden removal of all Soviet financing – 30-35% of Mongolia’s Gross Domestic Product (GDP) – by the beginning of 1991 (Goyal, 1999: 644) and the dissolution of the CMEA meant that Mongolia’s economy not only contracted suddenly but lost most of its export markets within the space of two years. Exports declined from USD 832 million in 1989 to USD 370 million in 1991 (Sneath, 2006b: 150). The government introduced rationing for basic foodstuffs in 1991 and began printing *tugriks* to make up for its sudden shortfall in budget (Goyal, 1999: 643). Inflation skyrocketed from virtually nil in 1989 to 121.2% in 1991 and 321% in 1992 (ibid). With little credit, high levels of debt obligation to the Soviet Union (Heaton, 1992: 53), rapidly declining revenues, and its northern neighbour demanding hard

currency for fuel and other vital materials (Rossabi, 2005: 35), Mongolia was on the brink of an economic and social disaster. Despite improved relations with China since the 1980s, Mongolia was reticent to seek Chinese assistance due to the long history of colonization and geopolitical tension between the two states; the government looked towards the West for new sources of assistance and trade (ibid: 36).

One of the main goals of post-socialist Mongolian foreign policy was to steer a path clear of its two neighbours – Russia and China – through alignment with Western powers. Mongolia’s “Third Neighbour Policy” struck a delicate ‘balance between its two neighbours... by declaring itself neutral as between Moscow and Beijing’ (Wachman, 2010: 589), while reaching out to new allies. The negotiation of this balancing and distancing strategy was to ‘avoid being subordinated to either of the two, whilst benefiting from the munificence and commercial opportunities each might provide’ (ibid). While not *overcoming* its asymmetrical position in relation to its neighbours, Mongolia carefully achieved relative autonomy in the 1990s and early 2000s. During this time, Mongolia was primarily indebted to international financial institutions, such as the World Bank, the IMF and the Asian Development Bank (Rossabi, 2005), and was a beneficiary of significant Euro-American aid, particularly from the U.S. and Germany.

In early 1991, Mongolia was admitted to the International Monetary Fund (IMF), the Asian Development Bank (ADB) and the World Bank, following a visit from the U.S. Secretary of State in 1990 (ibid: 37). From 1990-1992, a series of economic reforms were undertaken by the government of Mongolia to fulfil the conditions placed on its receipt of assistance from international donor agencies. These conditionalities followed the six tenets of shock therapy by requiring price liberalisation, linking the

Mongolian *tugrik* to international currency, eliminating government subsidies, privatising state assets and banking, selling most SOEs and liberalizing tariffs on trade (ibid). According to Sachs in 'Understanding Shock Therapy,' the triad of crises – state bankruptcy, system collapse, and structural transformation – were to be addressed through 'the rapid introduction of the six core institutions of capitalism' (Sachs, 1994: 29):

1.) A monetary system based on a stable, convertible currency; 2.) Freedom of international trade and foreign investment; 3.) Private property rights...; 4.) Private ownership of a high proportion of national assets; 5.) Corporate control of large enterprises...; and 6.) A social safety net.

Other reforms undertaken by the government included introducing a floating exchange rate and setting up a Stock Exchange, as well as a commercialised banking system (IMF, 2003: 1). The optimism of the Mongolian reformers and the goals of international financial advisers converged at least on practical aspects of institutional transformation, which satisfied the aims of both: the continued survival of an independent nation-state and the incorporation of post-socialist states into the capitalist market economy. The role of IFIs, particularly the IMF, the World Bank, and the ADB in this process was marked. As Fenwick (2007: 182) puts it,

In supporting the new 'rules of the game' in Mongolia, the ADB alone supported the development of several major pieces of legislation in the early-to-mid 1990s, including a Bank Law and a Central Bank Law... and the review of laws relating to business entities, contracts, secured transactions, bankruptcy, and foreign investment. In total, more than 25 pieces of legislation were passed in Mongolia in the four years

from 1991 that related in some way to transition. This included a new Civil Code (of approximately 400 articles) incorporating the important underpinnings of commercial life – contractual and property rights.

In terms of economic reforms, Mongolia was a model student of the Washington Consensus, instituting the privatisation, liberalisation and deregulation of its economy without delay (Sukhbaatar, 2012; Munkh-Erdene, 2011). Mongolia initiated its privatisation programme in the first year of its post-socialist transition (Korsun & Murrell, 1995: 473), starting with public assets, state-subsidized industries, welfare systems and importantly, the rural herding collectives – *negdels* (Sneath, 2003: 441-442). While requiring a huge amount of effort to legislate and implement this marketisation mandate, it also marked a shift in Mongolia's political and economic history because the public administration of pastoral land use was no longer a central governance concern. The economic vision of the new democratic Mongolia was a continuation of the industrial development narrative of Soviet socialism, where "traditional" economic modes were to be bypassed to make way for more "developed" forms of economy.

Privatisation played a critical role in Mongolia's post-socialist transition, 'leading as it did to an irreversible shift in productive assets from the state to the private sector, with the intention of creating a pluralist, liberal, capitalist market economy' (Nixson and Walters, 2006: 1558). Mongolia's national development strategy in these early days of reform was focused on enabling the 'active participation' (Goyal, 1999: 641) of the private sector to stimulate efficient economic growth and to create self-reliant citizens 'who had the mentality of private property owners' (Korsun & Murrell, 1995: 474). Mongolia's extensive privatisation programme embodied these aspirations, making it the most

critical feature of all the market reforms undertaken (ibid: 472-474). The “new” democratic government systematically privatised 470 state-owned enterprises including the *negdels*; 55% of this privatisation occurred in 1992 alone (Anderson, Young & Murrell, 2000: 530). By 1995, 95% of livestock, trade and services had been privatised (Goyal, 1999: 636). The dividends derived from the privatisation of SOEs were supposed to be divided among the public equally in the form of vouchers that could be exchanged on the Stock Exchange or at auctions for shares in the new private company (Korsun & Murrell, 1995: 475-476). The voucher system was promulgated on the basis of an inclusive approach to Mongolia’s national assets in addition to ‘providing the laboratory in which the Mongolian people would learn the psychology of capitalism’ (ibid: 476). While egalitarian in theory, the shares were concentrated in the hands of a few and had the effect of *increasing* inequality; Rossabi points out that ‘many citizens who were not conversant with a market economy sold their vouchers at depressed prices and thus gained very little from the redistribution of public assets’ (Rossabi, 2005: 51).³⁰

The privatisation of SOEs and the *negdels* shrunk Mongolia’s industrial base by exposing inefficient industries to free market mechanisms, causing most of them to collapse (UNIDO, 2011: 51). While some commentators saw this as inevitable, others perceived active *underdevelopment* of post-socialist states as a result of “shock therapy” and privatisation (Reinert, 2000). As Reinert (ibid: 3) forcefully puts it, ‘fifty years of industry-building was virtually annihilated over a period of only four years, from 1991 to 1995.’ While Mongolia did not inherit a particularly *wide* industrial base from the Soviet era, it had ‘slowly, but successfully, built a diversified industrial sector’ (ibid; Honeychurch, 2010: 410). Critically, the *negdels* had functioned as

³⁰ Rossabi also notes that by 2003, 0.5% of the population owned over 70% of the shares of the privatised companies.

agricultural industries during the Soviet era, producing meat and dairy products for export as well as subsistence. Declining demand for Mongolian meat products as a result of the collapsed CMEA and the privatisation of the *negdels* transformed pastoralism into a predominantly subsistence economy (Sneath, 2003: 448). The impact of privatisation displaced agricultural products as Mongolia's largest export (Worden & Savada, 1989), given the emphasis of Mongolia's reformers, both domestic and international, on developing Mongolia's global comparative advantage: minerals (Honeychurch, 2010: 409-410).

Following widespread privatisation measures in the 1990s, the deregulated pastoral economy became both a form of subsistence and a social safety net for the thousands of Mongolians facing unemployment as it provided at least subsistence and the possibility of some cash by selling meat, dairy and wool products (Pomfret, 2000: 154). The number of semi-nomadic herders swelled to over 30% of the total population and 50% of the working population (Mearns, 2004: 108), undoing all the "progress" made to gradually urbanise and settle Mongolia's nomadic population in the socialist period. This was the first time that herding operated outside of an intricate system of administration, either under customary law (which had been eroded in the twentieth century) or state law (ibid: 139). In contrast to previous eras where political authority over the Mongolian population was inevitably related to the governance of pastoral land use, the democratic state of Mongolia can almost be defined by its *devolving* relationship with pastoralism as an economic system; as Mearns put it in 2004 (ibid: emphasis added),

Institutional arrangements governing pasture-land management have undergone profound transformation over the past decade in ways that

*reflect a virtual abdication of public administration
rather than decentralisation or purposive intervention.*

The deregulation of the pastoral economy goes hand-in-hand with the intent of Mongolia's democratic reformers to change the collectivised mentality of Mongolians to that of 'private property owners' (Korsun & Murrell, 1995: 474). This intent to develop the 'psychology of capitalism' (ibid: 476) in Mongolians was embodied in the process of privatisation of the *negdels* and state farms, where herders were given shares in the form of vouchers in these SOEs to be traded on the new Stock Exchange. Where the Socialist period had initially tried to force the "psychology" of communalisation upon herders in the 1920s and 30s to no avail, the capitalist ambitions of the democratic reformers for herders also produced disappointing and mixed results (Rossabi, 2005: 51). The lack of practical state support combined with the influx of new herders on the land has led to a remarkable disintegration of 'established co-ordination norms' (Mearns, 2004: 139) rising inequality between wealthy and poor herders, and pastureland degradation (Fernandez-Gimenez, 2000: 1320).

(Re)Constitutionalisation Part II: A New Political-Legal Regime

The economic reforms that have been described would not have been possible without a liberal democratic constitution recognising private property rights and mandating institutional reform for the rule of law to protect them. The drafting of the 1992 constitution was the first necessary inroad into the 'monolithic' (Bedeski, 2006: 82) centralized socialist state: in a series of committee meetings (Fritz, 2008: 775), it abolished one-party rule, established the separation of executive, judicial and legislative powers, installed a semi-presidential system (ibid), and established a basic framework for electoral democracy (ibid: 771). These basic liberal constitutional structures were arguably

necessary for Mongolia to undertake a national privatisation programme by introducing the formal rights of contract and ownership of private property (Korsun & Murrell, 1995: 473). The constitution, however, was a highly contested document; it was drafted in a series of 'marathon sessions' (Fish, 1998: 129) over a period of 71 days by a constitutional committee appointed by the democratically-elected interim government. While Fish argues that its emergence out of a 'process of genuine deliberation and struggle within the national legislature' (ibid) is a sign of its legitimacy, the deliberation was arguably under the duress of an extreme recession.³¹ This secondary argument could explain why some of the more contentious points that the drafters faced were not resolved, particularly relating to land use and property rights (Fritz, 2008: 775).

For example, in paragraph two of Article Six of the constitution, the state remains vested with the ownership of all land as in the socialist era, '*except that given to the citizens of Mongolia for private ownership*' (Constitution of Mongolia, 1992, Article Six, emphasis added). Yet paragraph three, which describes the ownership entitlements of Mongolian citizens, maintains state ownership of 'public' pastureland and subsoil. Thus, citizens' land possession rights are thereby limited to rights of *usus* and *fructus* – to use and collect the fruits of the land. This is consistent with customary legal norms of land entitlements based on use rather than exclusive ownership. The preceding Article (Five) of the Constitution, however, affirms that Mongolia shall develop its economy 'based on all forms of property' – both private and public – and uphold the rule of law to protect the owner's rights. Articles Five and Six of the Constitution contain deeply incompatible ideological clauses regarding property rights; the

³¹ Some scholars argue that the recession Mongolia faced in the collapse of the Soviet Union was more severe than that faced by any country in the Great Depression – see Korsun and Murrell (1995: 473-474), Boone (1994: 314-328).

Constitution is supposed to facilitate ‘different forms of property consistent to universal trends of world economic development *and* country specifics’ (Article 5:1, emphasis added). The contradiction and limitation of this pluralistic recognition in a capitalist market economy will be explored in the following chapter when we turn to Mongolia’s mining economy.

Mongolia as a Model Market Democracy?

In sum, Mongolia’s democratisation and incorporation into the global capitalist order was accompanied by a radical break between the political and economic spheres. In particular, this break was characterised by the introduction of institutions to both legitimise and execute this unprecedented diremption in the organisation of political and economic power. Where the socialist state had created some basic institutions of capitalist production but set them within a specifically socialised framework, the ‘emancipation of the economy from the political structure’ (Sneath, 2003: 441-442) became a goal in its own right for the post-socialist state. This reflected the assumption of the international development consensus at the time (i.e., the Washington Consensus) that the market would naturally produce positive outcomes for society. The political sphere was not simply restricted from controlling the economy, but its very fabric was forcefully reorganised so that any prospect of regaining economic control would not only be “unconstitutional” but unthinkable within the terms of liberal democracy. The scope of Mongolian democracy has consequently been limited by the fact that ‘the people were only granted rights when the awful adjustment had been made’ (Polanyi, 1944/2001: 234); the democratisation of the Mongolian state under liberal democratic terms did not include the democratisation of economic power since it had been conveniently transferred to a separate “private” sphere.

Conclusion

The purpose of this chapter has been to establish an historical narrative of the co-constitutive relationship between the state and the economy in Mongolia. Using Karl Polanyi's idea that all economies are 'instituted' but some are 'disembedded' (i.e., self-regulating market economies), I have attempted to outline some of the key continuities and changes in the state-economy relationship. The aristocratic-pastoralist period was characterised by a general integrity of production *within* the fabric of the political system, imbued with customary legal norms overlaid by the more bureaucratic laws of Empire. A strong ethno-linguistic and religious narrative reinforced the political authority of the aristocracy and, later, the Buddhist monasteries, although this authority was tempered by the latter's reliance on common herders to sustain pastoral accumulation. In the early twentieth century, the Mongol state primarily responded to regional geopolitical forces, leading to an independence movement and the formation of an independent nation-state. The unity of the aristocratic-pastoral social order was at times violently and at other times gradually dismantled during the socialist period, where the economy was formed as a separate sphere to the state, although governed within an explicitly political framework. Collectivisation and the making of a labour force out of the predominantly pastoralist population was a feat of long-term social planning and coercion by the state. Somewhat ironically, the socialist period introduced the basic mechanics for a market economy, including the (regulated) principles of 'truck, barter and exchange' (Polanyi, 1944/2001: 59), labour, currency, surplus value extraction and, in later years, economic contracts. Despite this period of state-economic formation being described in its constitutions as 'non-capitalist,' it actually provided the material market basis to establish an economy outside of the direct control of the state after the fall of the Soviet Union.

However, as Polanyi (1944/2001: 60) puts it, ‘the step which makes regulated markets into a self-regulating market, is indeed crucial.’

In contrast to the two previous eras, Mongolia’s democratic-free market transformation did not push it towards one of its neighbours but to the West. Rather than Soviet advisors, Mongolia sought out the advice of IFIs. While this involved a political realignment with the “global” values of human rights, constitutionalism and a (liberal) democratic political system, it is significant that Mongolia’s main sources of support at the beginning of the 1990s were *economic* organisations. For example, the United States, Germany and other Western countries became part of Mongolia’s geopolitical reorientation through its “Third Neighbour Policy,”³² but their role was usually mediated under the aegis of economic development institutions, such as the IMF, the World Bank, and USAID. The institutionalisation of a boundary between the political and economic spheres – mediated by the rule of law – within the liberal constitutional framework neatly matched Mongolia’s new imperative to adjust to a global market economy, with few viable alternatives.

In terms of its national norms, Mongolia was in a great deal of flux in the early 1990s, lacking a concrete narrative for itself apart from the international (Western) applause at its ‘remarkable’ adoption of liberal political and economic institutions (Fish, 1998; 2001). The reality in Mongolia was much more chaotic, and most Mongolians remember it as a time of disarray and economic devastation. At the same time, it is widely remembered as a time of optimism for the possibilities of a democratic future, capitalist economic development and the rule of law. Drawing on this context, the following two chapters will engage with the

³² Mongolia’s “Third Neighbour Policy” is the foundational approach of the state’s post-socialist foreign policy to seek political and economic allies beyond Russia and China.

institutionalisation of an extractive economy in Mongolia (1994-2014) and the way that state power has been reorganised to facilitate foreign direct investment in the mining sector, with significant implications for Mongolian democracy.

Chapter Three

Mongolia's Transition to a Mineral Exporting Economy 1994-2014: An Overview of a Global Reordering Project

Introduction

"There is no other way: Mongolia was hurt by what we did in the past... There was no predictable investment almost at all."

– President of the Mongolian National Mining Association (author interview)

"Now we have a clear policy that says the economy should be based on the private sector and it should be liberalised." – Managing Director of Erdenes Mongol LLC (author interview)

This chapter provides a chronological overview of Mongolia's integration into the global minerals economy (1994-2014), in order to highlight the tensions and challenges of the national state's orientation towards transnational capital. The driving pressure to become globally competitive and attract foreign capital investment in a "frontier" sector (i.e., perceived as particularly "high-risk" by foreign investors) has reordering potential for the constitution of the state. Mongolia's experience of global economic integration in the minerals sector gives a concrete example of the powerful effects that this transformative potential can produce, evidenced in significant legal and political change enacted within the Mongolian state and civil society. As discussed in the first chapter, states in a position of dependence on foreign investment often find it in their own interests to create a stable legal-political infrastructure to attract and maintain investor interest in commodity sectors that are considered "high risk" (e.g. vulnerable to volatile commodity prices).

As I explained in the first chapter, the priorities and capacities of national states in general are vulnerable to being reordered and redirected to enable, sustain and protect markets because of their interdependent relationship with capital. However, the extent to which this reordering process transforms the state depends upon the state's dependencies and vulnerabilities when it comes to capital investment. States which have limited adaptation options due to the lack of state capital (i.e., dependent on foreign investment) or type of sector (i.e., primary commodity exporter) are particularly vulnerable to structural pressures to use their political and legal resources to stabilise conditions for markets to flourish and expand. A stable legal and political environment in these terms means that the state eases the conditions for investment by offsetting some of the financial and political risks of global market integration.

In the Mongolian context, I argue that we can see the transformative effects upon the state of integrating into the global minerals market, as its priorities and practices became increasingly coordinated and unified around the goal of creating a stable investment environment after the crisis of FDI in 2012-2103. The *de jure* rights of the state have been subordinated to a new market principle in practice: stability in the national investment environment. The gap that developed between the legitimate scope for state activity as defined by the written constitution and the increasingly limited scope for state intervention in the minerals economy between 1994-2014 – in practice – suggests a deeper shift in the constitution of the state. For example, Article 5.1 of the 1992 Constitution states that 'Mongolia shall have an economy based on different forms of property which takes into account universal trends of world economic development and national specifics.' Article 5.4 further establishes the state prerogative to 'regulate the economy of the

country with a view to ensure the nation's economic security, the development of *all modes of production*, and social development of the population.' (Article 5.4, emphasis mine).

In this chapter, I demonstrate the ways in which 'national specifics' have been subordinated to 'universal trends' of economic development. Furthermore, the attempt to reregulate the mining sector based on national priorities has been fundamentally delegitimised, unless 'the national' dovetails with the creation of a stable political-legal environment for the market. This hierarchy between the national and the global in Mongolia's mineral sector limits the state's autonomy to regulate the economy in a way that upholds plural forms of production and protects the public interest of citizens in natural resources that are vested in the State (Article 6.1 and 6.2). I argue that the state's impoverishment and growing dependence on foreign direct investment 'locks in' (Gill, 1998) reforms that affect critical aspects of the state's norms and capacity – in practice – to support diverse modes of production, take responsibility for national economic security (Article 5.1, 5.2 and 5.4) and to assert public ownership rights of natural resource wealth (Article 6.1 and 6.2). It limits the national expression of the state by institutionalising stability (of the investment environment) as a normative prerequisite to state action in the economy (Schneiderman, 2013; May, 2014). On one hand, this process can be understood as "destructive" to a national articulation of the state in the minerals sector because the *national* political interests of the state can no longer provide sufficient justification for changes to the regulatory environment. However, it also generates a new expression of the state in which its position in the global economy becomes the paramount "political" value that shapes it; the state's role becomes primarily defined by its facilitation of transnational capital.

The purpose of this chapter is to provide an historical overview of the powerful influence of market discipline – its mechanisms and norms – on the Mongolian state since integrating into the global minerals economy in the late 1990s. I posit that market mechanisms, particularly foreign direct investment, in Mongolia have been disciplinary in two senses. Firstly, they have affected concrete *practice* in terms of decision-making and the reorganisation of state institutions according to market preferences. Secondly, the discipline of the market has challenged the *principles* of the state, establishing normative boundaries for the state in relation to the market. The state's apparent adoption of values which depoliticise decision-making in relation to the mining sector suggests that market discipline has normative power, as well as power to affect institutional behaviour within the state. However, the discipline *of* the state must be understood, at least partially, as *self*-discipline: the transnational legal and political norm of stability has been internalised and implemented by national institutions and actors (Shaffer, 2014). The subordination of political values to economic ones in Mongolia's mining regime occurred through forceful financial mechanisms after the crisis of foreign investment in 2012-2013, although the state has been exposed to the legal-political logic of self-regulating markets since the post-socialist transition.

This chapter is structured chronologically, focusing on major points of legal and policy change in the mining sector from 1997-2015. It demonstrates the way that the state's policy and legal autonomy to regulate the minerals sector has been challenged, and explains the changing terrain of legitimacy for state regulation of the minerals economy in relation to the state's dependence on mining investment. This new terrain has been predominantly shaped by a conflict between public interest activism by Mongolian citizens and private interest activism by

investors, in which the latter have demonstrated their *de facto* power as the gatekeepers of the economy against the *de jure* rights of citizens to appeal to the national state's legally constituted obligations.

1994 – 2002: Making a Minerals Market on the “Final Frontier”

As described in the previous chapter, Mongolia suffered a devastating economic crisis following the collapse of the Soviet Union. Mongolia moved suddenly from the position of a middle-income country with a fairly diversified economy based on national industry (agriculture, manufacturing and mining) to an impoverished “developing” country whose industry base was too small to compete in the global capitalist economy (Reinert, 2000; Rossabi, 2005). Mongolian manufacturing lost its primary export market, the Soviet Union, and could not compete against other regional producers. The only base for Mongolia to develop competitive exports was in the mining and cashmere sectors, and Mongolia's new development financiers and advisors, such as the World Bank, actively promoted foreign-invested mining as a development strategy for the new democracy (Hatcher, 2014; Rossabi, 2005).

Consequently, in 1994, the newly constituted democratic government of Mongolia initiated the Gold Programme to stimulate investment in the mining sector. This programme was the first of its kind in Mongolia, where private companies had the right to gain access to geological information previously monopolised by the state and to hold mining permits for exploration and exploitation activities (Byambajav, 2012: 17). The Gold Programme was legally enabled by the democratic Constitution's recognition of private property rights, giving the state the option of using private investment to overcome its ‘cash

deficit' (Byambajav, 2014: 2). The 1994 Minerals Law provided a basic legal framework for prospecting, exploring and exploiting minerals but did not incite serious interest from foreign investors because it maintained a significant degree of potential for state involvement and discretion. Specifically, it introduced three categories of minerals – common, special and strategic (Article 4)³³ – with varying degrees of regulation depending on their importance to the state budget and the national economy. In line with this state-centric emphasis, the law recognised the state as having priority purchasing rights (Article 5.4). It also granted significant discretionary power to Parliament to limit the level of “strategic” minerals mining, ‘taking fully into account the interests of future generations to inherit non-renewable natural resources and pursuing the principle of thrifty and rational use’ (Article 6.2). The approval of Parliament was mandatory to the granting of strategic mining licenses to foreign legal persons (Article 7.5). Furthermore, the 1994 Law only permitted one extension for licenses (up to twenty years) (Article 15.5), gave the state the right to participate in joint investment and co-sharing of products and revenues (Article 12.1), and included state costs of exploration in the valuation of deposits (Article 12.4). Licence-holders were prohibited from transferring their license to third parties without state authorisation (Article 14), which was perceived by investors as a major barrier to competition. As Husband and Songwe (2004: 52) explain in their World Bank report – *Mining in Mongolia: Managing the Future*:

³³ According to Article 4 of the 1994 Minerals Law, ‘strategic minerals include gold ore, silver ore, and ores of platinum and other metals of its group...ruby, diamond, emerald, sapphire, uranium ore, oil, and hard coal’ (4.3). Additionally, ‘special minerals are minerals ores and non-metallic minerals’ except those designated as strategic or common (4.4). Finally, ‘common minerals include sand, gravel, sandstone, quartzite, clay, argillite, aluerite, chalk, limestone, dolomite, marl, intrusive rock, volcanic rock, altered rock and shale’ (4.5).

[T]he right to transfer or pledge licenses to and/or with other parties... is essential for project financing... [it] is one of the fundamental premises that has driven the success of the world's dominant mining jurisdictions – such as the USA, Australia, Canada – from the very beginning of their modern mining histories. It is now an essential “entrepreneurial” component in all successful mining legislation.

Thus, prior to 1997, Mongolia's mining regime was not perceived as attractive or competitive for foreign investors. Mining was still an important economic sector for Mongolia, but the industry was still largely state-owned and operated. A limited amount of mining co-existed with manufacturing and pastoralism, with 12.7% of the total landmass available for minerals exploration (Wu, 1997: 1).

Similar to the 1992 Constitution, the 1994 Minerals Law reflected the tension between the socialist power-holders and free market reformers in establishing basic juridical frameworks around the role of the state in the economy in the wake of the democratic transition (President of the National Mongolian Mining Association, author interview). The 1994 Minerals Law liberalised Mongolia's mineral sector in the sense that it recognised the validity of private property rights to extraction and ownership but within a framework that gave preference to the state. In short, it did not create the framework for *systematic* flows of foreign direct investment. However, it seems that Mongolia's status as a transitional market democracy spared the 1994 Law some of the scrutiny that would characterise future mineral legislation. Not only was the Mongolian context struggling to cope with the social change created by the post-socialist transition, but global commodity prices were relatively low, dampening investment interest.

The conditions of economic collapse in the early 1990s and consequent investor uncertainty in both the Mongolian market and regulatory environment meant that the 1994 Law was not particularly influential in generating investor interest. This did not seem to be a great surprise, or a disappointment, even to the private sector. As N. Algaa, President of the Mongolian National Mining Association (MNMA) reflected, it was 'very difficult for Mongolia to make a good law... we cannot blame [Mongolia], that was the situation' (ibid). The 1994 law, however, at least provided a legal framework for the Gold Programme, intended to generate income for the state in a period of crisis. Thus, the 1994 Minerals Law did not make great strides in opening up the minerals sector to investment at the time, but its partially liberalised approach reflected the ambivalence among legislators and policy-makers at the time about the extent of marketization, a conflict that generally characterised political debate in the beginning of the 1990s.

In 1996, the former communist party – the MPRP – lost the parliamentary election, allowing the democratic reformers their first opportunity to govern the new democracy. As the previous chapter explained, the Democratic Party was partly energised by the presence of young economists eager to integrate Mongolia into the global economy and to further free its market from the lingering constraints of the old command-style economy. 1997 marked a legal and political sea-change in the Mongolian state's approach to both mining and foreign investment with major amendments to the Minerals, Investment and Tax Laws, and significant increase in land made available by the state for mining exploration (from 12.7% to 40%) (Wu, 1997; Lander, 2013). Mongolia also joined the World Trade Organisation in 1997, signalling its commitment to global free trade. The upshot of this dramatic shift was to create the legal infrastructure to enable

large-scale foreign direct investment in the mining sector and to effectively make the potential of Mongolia's extractive industry globally competitive. The 1997 reforms marked a milestone in terms of Mongolia's openness to private, transnational capital, as well as proof to its transition sponsors – specifically the World Bank, the IMF and the ADB – that the state was serious about finding its comparative advantage both within and on the terms of the global market.

In 1997, a new minerals law was drafted and passed by Parliament. The 1997 Minerals Law was a new piece of legislation, not an amended version of the 1994 law. The World Bank funded the development of the law, with the support of the new government, and organised a foreign investors conference in the same year to advertise the new framework and stimulate investment into the minerals economy. The 1997 law provided a comprehensive liberal framework for the mining sector, easing conditions for investment and restricting the role of the state. A World Bank discussion paper – *Review of Environmental and Social Impacts in the Mining Sector* (2006: 2) – put it this way:

In the past decade, the Government of Mongolia has evolved from being predominantly the owner and operator of mines to being a manager and regulator.

The *Review* heralds the shift towards a 'management and regulation' approach as a progressive move away from the 'command and control' regulatory approach that characterised the socialist era (ibid). The role of the state within the new legal framework was to facilitate investment by establishing 'procedures for obtaining mineral licenses [which] are clear, simple, and quick' (Mineral Resources Authority of Mongolia, 2002). A World Bank working paper – *Mongolia Mining Sector:*

Managing the Future (Husband & Songwe, 2004: 52) – praised the 1997 Minerals Law:

The Minerals Law of Mongolia is acknowledged by the international mining community as one of the strongest legal presentations of mineral licensee rights and obligations in the world, and clearly the most investor-friendly and enabling law in Asia. This is due to the clarity of its provisions that establish one-stop “first-come/first served” license application and granting procedures, security of tenure for licensees, regulatory guidance for environmental protection and obligations of licensees, and assignment and transfer of mineral licenses. Nothing should be altered in this law to weaken these important principles.

The following table highlights various ways in which the 1997 Law would ease conditions for investors whilst restricting the role of the state in the mining sector.

Table One: Investor-State Rights in the 1997 Minerals Law

Easing Conditions for Investment	Restricting Role of the State
Eliminated restrictions on number of licenses that can be held by one legal person (formerly five under 1994 Law) (Article 13.7)	Removed classification of minerals based on national strategic value (formerly Article 4 of 1994 Minerals Law)
Simplified application procedure for exploration and mining licenses (Article 13 and 14)	Parliament restricted from limiting mining activity in general (only on State specially protected land – Article 6.1.4) and
No longer required feasibility	determining permissions for foreign investors to mine (Article

studies

6)

Environmental protection plans and impact assessments made into a secondary procedure, following granting of license (Article 29)

Government restricted from direct participation in exploration and mining – only through a business entity (Article 6.6)

Licenses granted on first-come-first-served basis (no discrimination between companies) (Article 14.1)

Significant decentralisation of social and environmental aspects of regulation to local administrations (*aimag, soum, bagh*):

Exclusive rights to explore and mine (Article 12)

➤ “ensure and monitor compliance by license holders of their obligations with respect to environmental protection, health and safety regulations for workers and local residents, and payment of their obligations to the treasuries of local administrative bodies” (Article 6.4.3)

No distinction made between domestic and international investors (Article 10.1)

Right to sell mineral products at market prices on domestic or international markets (Article 16.3)

License extensions for forty years (Article 16.6) (formerly twenty under 1994 Law – Article 15.5)

Eliminated state priority of purchase of minerals (formerly Article 6 of 1994 Minerals Law)

Right to use water (Article 16.10)

Stability agreement provisions for 10-15 years for investments > two million USD (Article 20) These agreements determine:

- Tax rates
- Export and sale of products at international prices

Established universal royalty rate at 2.5% (Article 38.3)

Licensees had the right to transfer or pledge licenses to and/or with other parties (Articles 12 and 40; see also Husband and Songwe, 2004: 52)

The many proponents and few critics of the 1997 Minerals Law agreed at the time that it inaugurated a major shift in favour of protecting investor rights and shaking off lingering shadows of state control of the sector. The President of the Mongolian Investors' Association would later note that the resurgence of commodity prices in the late 1990s – following the Asian Financial Crisis – complemented the government's efforts to encourage private investment into the mining sector:

By the 2000s, when commodity prices were rising, our government was also encouraging companies to get involved in mining activities... Whoever had some capital, they started investing into mining activities... Mongolia's market is very small, only three million people, so mining business is the number one chance we can do some big business, you know. So that's why a lot of businesses got involved with mining (President of the Mongolian Investors' Association, author interview).

Both domestic and foreign investors – treated equally under the 1997 Minerals Law – leapt at the new opportunity to access this

largely untapped frontier minerals market. Many Mongolian entrepreneurs invested newly acquired capital in the mining sector in the late 1990s, particularly those that had benefited from the privatisation of SOEs. The privatisation of former socialist geological institutions and laboratories in the early 1990s and the lack of new institutions to control geological information gave companies in the late 1990s a head start on exploring in the most viable locations. In this “frontier rush” atmosphere, some of the world’s largest and most established companies competed for access to mineral-rich territories alongside small and medium-scale enterprises. This initial rush for access to the new market was characterised by diversity in the origins of companies, from BHP Billiton (Australia), Centerra Gold (Canada), to new Mongolian companies ready to invest newly acquired capital assets.

The 1997 Minerals Law created a relatively efficient structure for decision-making about mining licenses. An implementation agency was established within the Ministry of Industry and Trade (now the Ministry of Mining) to ‘facilitate the implementation of the new minerals law’ (World Bank, 2006: 3): the Mineral Resources Authority of Mongolia (MRAM). Whilst officially embedded within the Ministry, the agency enjoyed significant decision-making authority, where licenses were issued on a first-come-first-served basis (Officer, MRAM, author interview). The concentration of implementation power and discretionary oversight of the minerals sector within MRAM was remarkable, particularly in light of MRAM’s authority to assign ‘extensive exploration rights’ (World Bank, 2006: 29) through its Cadastre Division. Stability agreements did not have a review process outside of the Ministry and MRAM; the signature of one financial minister was sufficient authorisation (Sukhbaatar, 2012: 225).

The legal environment created by the 1997 Mineral Law not only eased conditions in which to invest, but branded Mongolia as a liberal regulatory environment. According to the former Executive Vice President of Ivanhoe Mines (Kirwin, 2006), the 1997 Minerals Law was a key catalyst for the development of the Oyu Tolgoi copper and gold mine in the South Gobi, and highlighted Mongolia's status as an emerging free market economy. The newly liberalised framework created by the 1997 Minerals Law enabled Ivanhoe to rapidly extend the process of exploration beyond the relatively shallow and ad-hoc drilling of its predecessors.³⁴ In 2001, an exploration team lead by Robert Friedland of Ivanhoe Mines, discovered unprecedented gold and copper resources 80 kilometres from the Mongolian-Chinese border.³⁵ By mid-2003, Oyu Tolgoi was the biggest mining exploration in the world, with eighteen drill rigs operating twenty-four hours a day, seven days a week (Turquoise Hill Resources, 2013).³⁶ In addition to the 2001 Southern Oyu discovery, three additional deposits were discovered (2002-2008) which comprise the current Oyu Tolgoi mining complex (Turquoise Hill Resources, 2013; Kohn and Humber, 2013). Oyu Tolgoi is now estimated to contain almost 43 million tonnes of copper and 1,850 tonnes of gold, the largest high-grade deposit of their mineral classification³⁷ in the world (Porter, 2016: 375-376). The impact of the investment from the Oyu Tolgoi exploration was swift: the mineral sector's share of GDP grew from 10% in 2002 to 33% in 2007 (Combellick-Bidney, 2012:

³⁴ While anomalous geological indicators were registered in the 1983 Mongolian Geological Survey, it was not until 1996 when Magma Copper, a large American company, secured exploration rights to the deposit that Oyu Tolgoi generated any serious attention. By the end of that year, Magma Copper had been purchased by BHP Billiton, an Australian company, which took over their exploration rights. BHP Billiton quickly sold their exploration rights to Ivanhoe Mines following the copper bust in 1997.

³⁵ Ivanhoe's 2002 independent research audit states that the initial exploration area contained 10 million ounces of gold and 5.6 billion pounds of copper (Turquoise Hill Resources, 2013).

³⁷ Palaeozoic porphyry deposits (see Porter, 2016).

273), and also constituted over 70% of total industrial output in 2007 (Tse, 2009), officially putting Mongolia into the category of mineral dependence.³⁸

2002-2006: Re-Evaluating the State-Market Balance

The 1997 Minerals Law fundamentally redefined the state-market relationship in the minerals sector, from a model of relatively strong state control to that of state-market complementarity. Formerly, the command economy and authoritarian political regime of the socialist period had designated the state as not only the owner of the minerals but the main organ of their exploitation. As explained in the previous section, the 1994 Minerals Law was still characterised by the presumption of a strong state. However, the 1997 Minerals Law established a complementary division of regulatory labour, with the central state limiting itself to the technical administration of licenses, the collation of geological data and the collection of rents, established at economically rather than politically competitive rates. For example, the tax regime did not reflect the state's ownership of natural resources by establishing substantial, non-negotiable rates. Instead, tax rates were used as leverage to attract investors, established at competitive rates that could be changed, delayed or eliminated in the context of stability agreements. Additionally, the central government delegated significant social and environmental responsibilities to local administrations, thereby dispersing its authority as the central institution of regulation. The growth of investment interest in the Mongolian minerals sector and the ease with which exploration and exploitation

³⁸ There is a growing literature on the calculation of natural resource dependence. Resource dependence is typically calculated based on the share of natural resources in GDP, national exports and/or government revenue (see Sachs and Warner, 1995; Baunsgaard, 2012). Over 20% in any category indicates significant mineral dependent (see Hailu and Kipgen, 2017, for an overview of different indices and introduction to the Extractives Dependence Index).

licenses could be obtained tested this new division of labour in three distinct ways.

Firstly, the increase in mining activity from 1994 onwards produced extraordinary socio-environmental dislocation within a short space of time. The impact of opening Mongolian territory to mining investment had the unanticipated consequence of creating an informal mining economy, characterised by rudimentary extraction techniques and precarious living conditions. By 2001, up to 100,000 illegal gold miners were employed in the informal mining economy that had developed alongside the gold rush in the mid-1990s (World Bank, 2006: 8; Byambajav, 2012). The lack of strong environmental oversight meant that many small and medium-scale gold-mining operations had failed to rehabilitate the land, leaving it open to artisanal mining. Propelled both by rising poverty levels in the post-transition period as well as the lure of competing, albeit illicitly, in the booming gold market, the phenomenon of illegal “ninja” miners became a sign to many Mongolians of the abdication of effective state regulation of the mining economy.³⁹

The sudden appearance of mobile and unregulated illegal miners in rural Mongolia challenged the socio-environmental expectations of a predominantly pastoral population. The administration of pastureland was already under pressure with a rapid increase in the number of herders following the economic collapse of the early 1990s.⁴⁰ While these new herders had squeezed available land and water, the presence of illegal miners

³⁹ The demographic of illegal miners is complex, despite their caricature as polluting criminals (High, 2008). Herders seeking to either supplement or find an alternative livelihood, ex-convicts and unemployed professionals from Ulaanbaatar found their way to the gold fields.

⁴⁰ The herding population grew from 18% to 50% of the working population in the 1990s (Mearns, 2004: 108; Rossabi, 2005: 121).

created a new kind of tension over access to resources because of the conflicting approach to resources by pastoralists and miners. Illegal miners were often perceived as having no respect for the sustainability of the land, the health of the rivers or respect for the locality, despite many “ninja” miners being former herders. In particular, the use of mercury by gold miners in general and the pollution of rivers was a catalyst for growing dissatisfaction with the regulation of mining, as well as the social disruptions associated with temporary mining camps (i.e., child labour, sexual abuse and various forms of violence).

Secondly, the introduction of extractive land use created a hierarchy between the mining and herding economies. The 1997 Minerals Law introduced a new hierarchy of property rights in the rural economy as pastoral land-use regimes had to compete for the first time against centrally issued mining licenses. Pastoralist property rights were, and still are, uncodified in Mongolia (Tumenbayar, 2002). The presumption of state ownership of property during the socialist period meant that herders only had access to use-rights, administered initially through pre-socialist customary systems and gradually institutionalised through collectivisation. With the disintegration of the *negdels* in the late 1980s, customary norms again became the basis for regulating pastureland. This was a somewhat fraught process, given that “customary norms” had been maintained to some degree through the socialist period but nonetheless morphed and shifted significantly. The arrival of “new herders” migrating from the city to the steppe looking for subsistence during the economic collapse of the early 1990s added another dimension. However, use-rights were negotiated between old and new herders in an informal and ad-hoc way. The arrival of mining companies in the mid to late 1990s interrupted the informal negotiation of property use-rights between herders, as

companies' codified rights to explore and exploit the minerals under the soil were formally guaranteed by the newly established Mineral Resources Authority and justiciable by national courts and/or international arbitration.

The issuance of mining licenses from the central government created an imbalance of power between herders and mining companies, due to conflicts between centrally issued mining licenses and herders' informal entitlements to land use (Tumenbayar, 2002; Endicott, 2012: 143). By 2004, approximately 26% of Mongolian land was covered in mining licenses for exploration and extraction (Husband and Songwe, 2004: 7); 50% of these licenses were held by only seven companies, the four largest of which were foreign (ibid). By 2009, the number of licenses had almost doubled, to cover 45% of Mongolian territory (Suzuki, 2013: 277). The environmental inputs of mining in terms of land and water not only created an economic conflict of interest with herders, but threatened to undermine the 'material, environmental and cultural bases of the livelihood of local communities' (Byambajav, 2012: 13). Small groups of herders suffering from the pollution and drying up of rivers, displacement from precious cultural landmarks and customary grazing land began to organise themselves to resist these changes in the early 2000s. These movements expressed resistance in various ways initially, through short-term direct action protests, such as roadblocks, hunger strikes, and lobbying within the Citizens Councils of local government to block the approval of mining licenses (Byambajav, 2012, 2014; Upton, 2012).

Thirdly, the strong presence of foreign companies in the mining sector contributed to negative public sentiment about the use of national wealth for the gain of foreign "others." This "insult"

added to the general “injury” expressed in the ‘growing public outrage over the country’s lack of socio-economic improvements, despite the mining boom’ (Hatcher, 2014: 136). Additionally, growing political unrest about environmental degradation, new social ills in rural localities and power imbalances in the distribution of land heightened public concern. It was further heightened in the case of Oyu Tolgoi, once the significance of the deposit was realised. In April 2006, protests erupted in Ulaanbaatar, fuelled by remarks of Robert Friedland, then CEO of Ivanhoe Mines, revelling in the huge profit margins that were to be made by the company out of the resources in the deposit. Friedland’s comparison of Oyu Tolgoi to t-shirts being made ‘for five bucks and selling them for a hundred dollars’ incensed a vocal part of the Mongolian public in 2005, leading to a three-week protest campaign and the burning of an effigy of Robert Friedland and several government ministers (New Internationalist, 2006; Reuters, 2010).

The global context of a commodity boom and the national context of an impending Oyu Tolgoi stability agreement were two important features of this period. The stakes were heightened for the Mongolian government because it had started negotiations with Ivanhoe Mines in 2004 for a stability agreement, the terms of which would likely affect the trajectory of national development for the 21st century. The global boom in commodity prices offered an opportunity to gain more control of the Oyu Tolgoi deposit, creating competition between national power-holders as to which party interests would be reflected in the investment agreement. The timely coincidence of a commodity boom with the Oyu Tolgoi stability agreement negotiations engendered political conflict between political parties at a time when the government was particularly fragile following the 2004 parliamentary election. While the MPRP had been expected to win the election

(Schafferer, 2005; Sukhbaatar, 2012), they only received 49% of the vote and half of the seats in Parliament (thirty-six). Without a majority, the MPRP entered into a 'grand coalition government' (Schafferer, 2005: 746) with the Mongolian Democratic Coalition and other major parties.

Despite the rhetoric of unity, the cracks in this 'grand coalition' quickly became evident, with the MPRP dissolving the coalition government in January 2006. The political bickering of the parties reinforced citizen anxiety about the close relationship between the government and investors, particularly Ivanhoe Mines, which the opposition parties used to their advantage. For example, in May 2006, twenty-six opposition MPs staged a walk-out to protest government corruption and support 'calls for better terms in negotiations with foreign miners' (White, 2013; Reuters, 2006). This display of nationalism from mainly Democratic Party MPs is somewhat ironic, as that party was the main architect and political force behind liberalising the mining investment framework in the 1997 Minerals Law. The internal conflict between the parties coincided with protest movements urging the state to 'protect the basic interests of the people' and 'provide a legal environment with Mongolia to have an advantage in the minerals sector' (Sukhbaatar, 2012: 223).

To conclude this section, the sudden emergence of illegal mining, the subordination of herders' customary entitlements to miners' property rights and the presence of foreigners in Mongol heartlands – and all the socio-environmental dislocation entailed by these phenomena – provoked major public concern about the influence of foreign investors on the state, as well as the state's capacity to address the socio-environmental impacts of mining. The subsequent push for national law reform reflected a strong sense on the part of voters and their representatives that the

government could – and should – regain some regulatory power and political control of the mining sector. The visible disturbance to public life in Mongolia created a fertile political moment for the government to re-evaluate the regulatory balance that had been struck in the 1997 Minerals Law.

2006-2009: State-Market Compromise and the Oyu Tolgoi Investment Agreement

In May 2006, legislators proposed a new draft Minerals Law. In July, after less than three months of deliberation, a new minerals law was passed by Parliament. The 2006 Law can be understood as a mixture of the 1994 and 1997 Laws, giving the state wider regulatory powers within an enabling market-based framework that still guaranteed investor access to international markets and a stabilised tax environment. The government framed this decision to “bring the state back in” as a win-win for the public and private sectors, stating at an investor conference that,

The involvement of government will stabilise the project by lowering any risks that may face a project, such as the issue of infrastructure, power and water supplying permission... it [will] not control projects only prevent exploitation and provide a stable business environment (Sukhbaatar, 2012: 224 quoting BBC Worldwide Monitoring, September 14, 2006).

However, the 2006 Minerals Law effectively redrew the boundary around the state’s involvement in the sector to some extent, giving legal legitimacy to the expression of national interest in the mining economy. The Law reintroduced the concept of mineral classification based on the national strategic value of deposits (Article 6), expanded the competence of Parliament to ‘approve or initiate’ the strategic value of a mineral deposit (Article 8.1.4) and determine the state’s share in those deposits (Article 8.1.7). It

also gave Parliament wider discretion to ‘determine’ state policy in the mining sector (Article 8.1.1), and ‘restrict or prohibit exploration and mining activities’ in ‘certain territories’ at its own initiative or the suggestion of the Government (Article 8.1.5). In terms of the ownership of minerals, the 2006 Law gave rights to the state to hold direct shares in strategic minerals deposits: up to 50% in cases where the State funded exploration and up to 34% where the State did not contribute finance to the exploration (Article 5). The State’s right to hold direct shares in the deposit was not unqualified, but dependent upon negotiation of an agreement with other share-holders upon exploitation of the resource.

Reflecting upon the 2006 Law, Sukhbaatar (2012: 225-226) accurately points out the redistribution of decision-making authority in stability agreements in favour of Parliament. Where the 1997 Law gave the power to sign a stability agreement to a ‘financial minister on behalf of the government,’ (ibid: 225) the 2006 Law required ‘an investment agreement... to be made jointly by three ministers in charge of finance, mining and environment upon authorisation by the cabinet (Article 29.4)’ (ibid: 226) for investments up to US \$100 million. The requirement of parliamentary approval for investment above the “cabinet cap” asserted a strengthened form of representative safeguarding of national “strategic” interests by placing large-scale investment agreement negotiation within an explicitly political state institution, rather than the executive ministries of government. Furthermore, the 2006 Minerals Law concentrated the collection of tax and royalty revenues at the central level, a move that would later frustrate the relationship between local administrations and the central state. The centralisation of revenue collection reinforced the emphasis on generating *national* wealth through the exploitation of minerals.

Within the contractual framework of investment agreements, the law stipulated a range of additional clauses imposing new duties upon investors and raised the bar of necessary finance to qualify for an investment agreement, from US \$2 million to US \$50 million (Sukhbaatar, 2012: 225). Introducing investment agreements under Article 29 of the 2006 Law gave the state the opportunity to put more obligations on investors while still incentivising their interest in investing by providing for ‘improved recognition to investors making larger, longer term commitments’ (Ivanhoe Mines, 2006: 3). In addition to the former rights to a stable tax environment, to sell mineral products at international prices and to discretionary management of income, Article 29 of the Law required the investor to make commitments to ‘minimise damage to environment and public health’ (29.1.5), protect the environment (29.1.6), leave no negative impacts on other industries (29.1.7), and promote regional development and increase employment (29.1.8).

Furthermore, the 2006 Law gave local governments legal standing in relation to mining companies by requiring them to negotiate agreements ‘on issues of environmental protection, mine exploitation, infrastructure development in relation to mine-site development and job creation’ (Article 42.1). Articles 42.2 and 42.3 provided pathways for citizen participation in public forums and ‘monitoring of the license holder’s activities’ vis-à-vis an elected representative. All of these changes clearly responded to demands by new political movements, particularly in rural areas, for the state to make mining companies accountable for environmental damage and to increase the inclusion of citizens in decision-making processes (Byambajav, 2012; 2014). By introducing investment agreements as a stronger form of contract in the international mining sector, the state now

had the right to negotiate a specific investment agreement for Oyu Tolgoi but on the basis of improved standing.

Changes in the tax regime in early 2006 evidenced a balancing act by the state in terms of increasing its expected benefits from mining projects while still maintaining investment interest. A few bold new measures were balanced with general ongoing support for investors' rights. For example, the government appeared to champion the national interest by introducing a controversial Windfall Profits Tax in May 2006 and doubling the royalty rate in the Minerals Law from 2.5% to 5%. Combined with the reintroduction of nationally "strategic" deposits and the push for the state to hold direct stakes in mining projects, Mongolia gained a reputation for "resource nationalism" in the international media and among investors (Sukhbaatar, 2012; Lander, 2013). Notably, a group of Russian investors filed a case with UNCITRAL (*Paushok v Mongolia*) in 2007 under the Russia-Mongolia BIT on the basis that the windfall profits tax jeopardised their right to fair and equitable treatment (see Knotterus and Olivet, 2016).

However, the 2006 Minerals Law actually reduced corporate income tax (from 30% to 25%) and value-added tax (from 15% to 10%) from 1997 levels and instituted a flattened rate of personal income tax (10%) (Ivanhoe Mines, 2006: 3). Furthermore, it provided for an Investment Tax Credit where 10% of the investment amount was deductible from tax duties. The 2006 Law also doubled the time frame of stabilisation to thirty years in the case of investments over 300 million US dollars. This reflected the state's priority on large-scale mining projects, hoping to discourage widespread mining through small and medium-scale enterprises, which were seen by the government as contributing less to national income and also lacking the "capacity" to follow more stringent socio-environmental regulation.

The imperative to at least appear to respond to citizens' interests, maximise state revenue in a commodity boom and yet sustain investor interest in the Mongolian mining sector generated a complex state-investor dynamic in the post-2006 political-legal environment. The period leading up to the signing of the Oyu Tolgoi Investment Agreement (OTIA) in 2009 was marked initially by anxiety due in large part to the extent to which Oyu Tolgoi offered hope of an accelerated path to economic development. Initially the move to permit the state to hold direct shareholding stakes in mining projects was met by resistance from investors, particularly from Ivanhoe Mines, but soon became less controversial as investors realised some of the benefits of working closely with the government, particularly in terms of gaining permit approvals (Sukhbaatar, 2012: 224).

In October 2009, after five years of negotiations, the OTIA was signed by the Mongolian government, Rio Tinto and Ivanhoe Mines (now Turquoise Hill Resources). The Mongolian government emerged with a 34% stake,⁴¹ with the right to appoint three members (out of nine) to the Board of Directors. The OTIA determined stabilised tax rates and a zero rate for Value-Added Tax (VAT) for specified goods and services related to Oyu Tolgoi, in addition to the freedom of the foreign investor to repatriate export earnings (OTIA, Article 2.1 and 2.18). It also gave the foreign investor the right to avail itself of lower tax rates if they existed in applicable international or double-taxation treaties (ibid, Article 2.27). In turn the foreign investor committed to a range of initiatives to 'support socio-economic development policies...to ensure that sustainable benefits from the OT Project reach Mongolian people, including people in Umnogovi *aimag*' (ibid, Article 4.5). The OTIA instituted a division of labour

⁴¹ In the lead up to the 2008 elections, there was an attempt by some leading politicians to renegotiate this level to 50% but Ivanhoe refused.

between the parties, with Rio Tinto responsible for the management of the project as a preferred stakeholder and the Mongolian government responsible to fund its “common” stake in the project by investing in infrastructure. The context of the global financial crisis in 2008 hastened the signing of the Oyu Tolgoi Investment Agreement as it became clear that ‘requiring yet more analysis of the public finance or economic implications of the project’ or ‘any further delays in the Oyu Tolgoi Project’ would discourage the investment interest of Ivanhoe Mines and Rio Tinto (World Growth Mongolia, 2009: 4). The Windfall Profits Tax, having sent ‘a negative message to foreign investors’ (Ivanhoe Mines, 2006: 4) was also repealed in 2009.

Between 2006 and 2009, the opportunity for the state to regain some influence in the mining sector seemed to provide both an economic and political solution to the pressing issues of depleted state capital and a discontented public. It could be described as a period of recalibration in the state-market relationship, characterised by outbursts of high emotion and passionate lobbying by government bureaucrats, legislators, activists and investors as a balance was struck within the legal framework between claims for the interests of the voting public, political parties and the private sector. However, as noted, a large degree of continuity in neoliberal state support for the private sector was maintained underneath the more vocal aspects of “resistance” to foreign control of Mongolia’s mineral wealth (Hatcher, 2014: 108). By 2009, the political volatility which had characterised earlier years seemed to have settled, with a balance struck between state and investor interests, with limited state involvement in strategic mining projects and a more centralised tax framework. Qualified state participation had been permitted in the minerals market without jeopardising the unprecedented Oyu Tolgoi Investment Agreement.

2009-2013: Optimism and Entanglement

This extended quote from one of the author's interviews highlights the initial optimism which subsequently gave way to disenchantment, particularly among government officials, following the signing of the Oyu Tolgoi Investment Agreement:

My attitude or my thinking about mining companies has changed... Before 2009 or 2010... my imagination was perfectly positive about the mining companies, especially companies like Rio Tinto, you know, because I was part of the government working group for the [Oyu Tolgoi] Agreement... I was thinking, "This is a multinational company... They will never lie..." But then since 2012 when there was a dispute... Rio Tinto as a global company actually managed all the media... so all the information about investing in Mongolia internationally was very, very negative: "This is one of the worst countries in the world to invest your money!" This was a big attack for Mongolia. No one would risk money, maybe except China or Russia. Why are [Rio Tinto] doing this? It was actually very unbalanced and very unequal.

– Former Deputy Director of Legal Policy Department, Ministry of Justice, and Member of the Oyu Tolgoi Working Group prior to the signing of the Investment Agreement (author interview)

As explained in the previous section, the Mongolian government had achieved a stronger presence for itself within the minerals economy under the 2006 minerals framework, both in terms of raising expectations on investors, especially in terms of financial commitment and socio-environmental obligations, *and* in terms of generating more substantial revenue for the state. The presumption at the time was that the government could shape the function of the market without interrupting it and by doing so

could mitigate its most damaging aspects (i.e., environmental degradation, social dislocation, Dutch Disease, economic inequality).

Institutionally, this optimism had been reflected in the creation of two new funds to 1.) redistribute mineral rents to the public and 2.) prevent pro-cyclical spending by the government. In November 2009, the Human Development Fund (HDF) replaced the Mongolian Development Fund (est. 2007) 'to counteract rising inequality and distribute the benefits of the mining boom more widely' (Isakova et al., 2012: 10). The state was supposed to allocate a portion of revenue to the HDF each year based on expected earnings from mineral dividends, royalties and taxation (ibid: 11; Campi, 2012). It was primarily designed as an ongoing 'cash transfer mechanism,' (Isakova et al., 2012: 11) in addition to funding education initiatives and social services (ibid; Yeung & Howes, 2015; Moran, 2013). According to Campi (2012), the HDF was a legal milestone for the Mongolian public, as it enshrined 'equal eligibility' for each citizen to share in the country's mineral wealth. To generate savings and prevent reliance on volatile mineral prices, the Parliament passed the Fiscal Stability Law in 2010 and the Integrated Budget Law in 2011. These laws have the combined effect of capping the deficit and public debt at 2% and 40% of GDP respectively, keeping expenditure in line with the growth rate of Mongolia's non-mineral GDP, and constraining the power of Parliament to influence the state budget (Ognon, 2013). According to the European Bank for Reconstruction and Development (EBRD), the Fiscal Stability Law crucially included the introduction of a 'transparent formula for copper price projections' (Isakova et al., 2012: 15) to help the Mongolian government anticipate the boom and bust cycle of this commodity market. Finally, the Fiscal Stability Law established the Fiscal Stability Fund to accumulate 'excess commodity-related

revenues' (ibid) from boom phases in order to supplement financial losses experienced in bust phases of the cycle.

In 2011, Mongolia recorded the world's highest GDP growth at 17.5% (World Bank, 2013: 3), and was acclaimed internationally as a "Global Growth Generator." The '2010/2011 spike in commodity markets' (World Bank, 2011: 1) created a fever of investor interest (President of the Mongolian Investors' Association, author interview). Combined with the initial influx of investment – US \$4.6 billion – to develop the surface operation of the Oyu Tolgoi project in 2010, there was a general sense of a "win-win" solution shared by the government and investors in the context of the 'global supercycle' of commodity prices. Given that Mongolia's total GDP was only US \$4.2 billion in 2009 (Isakova et al, 2012: 2), it is hard to overstate the significance of the Oyu Tolgoi investment for Mongolia's prospects for economic development at the time. As the Director of the Strategic Policy and Planning Department at the Ministry of Mining put it (author interview),

Prices were high, everyone could do business, everyone was satisfied, everyone was too confident.

The influx of FDI into the mining economy had a significant effect across the national economy. As expected, support and infrastructure industries also boomed at this time, particularly to service the development of Oyu Tolgoi. The presence of new mining ventures in rural areas created new demand and higher prices for meat, as well as new housing developments in high-income areas on Ulaanbaatar's outskirts to house foreign business people and their families, as well as the rising middle class. Apart from these quite direct effects, the increase in capital flow within the domestic economy caused the *tugrik* to appreciate by 13% against the US dollar in 2010 (M.A.D. Investment

Solutions, 2013), with 'record high reserves' held by Mongol Bank that year. As citizens' purchasing power increased, so did demand for secondary goods and services, leading to a boom in expensive coffee shops, high-line retail and luxury apartments. However, this new wave of growth had shallow roots, as it was fundamentally linked to the welfare of the mining sector. In hindsight, the President of the Association of Investors in Mongolian Mining (author interview) reflected on the real risk associated with the boom in mining investment:

Now everybody's stuck into this. But it's also [a] very big problem because all our capital assets [are] locked in mining business.

The 2006-2009 period had seen the state making strong commitments in two directions: to finance its direct stakes in mining projects and to redistribute tangible benefits from the mining sector to citizens. In 2011, the Mongolian government established the Development Bank of Mongolia through law 'with a mandate to finance development projects' (Isakova et al., 2012: 9) specifically related to mining infrastructure (i.e., transportation) (IMF, 2012: 3). This need for finance was mainly catalysed by the Oyu Tolgoi and Tavan Tolgoi projects in the South Gobi region. The government required finance to fund its 34% stake in the Oyu Tolgoi project through infrastructure development. As the government's stake in Oyu Tolgoi was initially obtained by receiving a loan from Rio Tinto which had to be repaid in order to receive dividends, the government sought to expedite the mine development process by taking on significant debt in the short-term. An operating contract with foreign investors for the eastern bloc of Tavan Tolgoi (100% state-owned) was also concluded in October 2011, requiring a renewed level of state investment through its subsidiary company, Erdenes Tavan Tolgoi. To expedite the export of coking coal from Tavan

Tolgoi to China and other East Asian markets, infrastructure was required ‘immediately’ to reduce high product costs associated with freight expenses (InfoMongolia, 2013).

Funding infrastructure development for both of these mining projects required significant capital expenditure from the state. Thus, despite the intention of the fiscal stability framework to prevent “expansionary” spending during boom periods, the creation of the Development Bank enabled the government to technically circumvent the framework and acquire new debt because the Fiscal Stability Law only regulated spending by the central bank. Between 2012 and 2013, the government and the Development Bank ‘borrowed over US \$2 billion in international debt markets,’ (Dettoni, 2013), with both public and external debt more than doubling between 2011 and 2012 (World Bank, 2013: 24). In November 2012, the Mongolian government sold its first bond – the “Chinggis Bond” – worth USD 1.5 billion on the international bond market to fund energy and transport infrastructure, such as the Millennium Road project (Frangos & Natarajan, 2012). The Development Bank of Mongolia also sold a bond worth USD 580 million, directly guaranteed by the government (World Bank, 2013: 24). Consequently, the commercial proportion of Mongolia’s external debt overtook concessional development loans from IFIs for the first time. The Mongolian government was desperate for loan financing at the time, to fund its infrastructure projects. Consequently, in 2011, Mongolia and China entered into three-year currency swap agreement to maintain Mongolia’s financial liquidity – worth USD 770 million.

In addition to the financial pressure generated by the sudden development of its two mega-mines, the government was also under pressure from its voting constituency to make good on its

promises of redistribution (Yeung and Howes, 2015; The Economist, 2012). Between February 2010 and June 2012, the government created a universal cash transfer programme through the Human Development Fund based on new mineral revenues (Yeung and Howes, 2015). Tangibly this amounted to a monthly transfer of 10,000 MNT (USD 7.42) to each Mongolian citizen between August and December 2010, and 20,000 MNT (USD 16.57) between January 2011 and June 2012 (ibid: 14). As the subject of universal cash transfers had been a campaign platform for both the major parties in 2008 – the Mongolian People’s Party (MPP)⁴² and the Democratic Party – the desire to maintain popular support in preparation for the June 2012 election meant that the programme was continued despite becoming ‘increasingly unsustainable’ (ibid). As Yeung and Howes (ibid) observe, the programme left the state-holding company – Erdenes Tavan Tolgoi – ‘technically insolvent’ in 2012 when USD 310 million was transferred from the company to the Human Development Fund to enable ongoing payments to the public.

The growing financial pressure on the government due to rising debt pushed it towards Mongolia’s southern neighbour, China, which consumes the majority of Mongolian coal, effectively controlling the sector. Diminishing reserves in the Human Development Fund led to increased dependence on “support” from the state-owned Chinese investor in Tavan Tolgoi – the Aluminium Corporation of China (Chalco). Chalco enabled Erdenes Tavan Tolgoi to remain solvent through an advanced payment of USD 350 million, on the condition that Erdenes would sell coal to Chalco at reduced prices, from an original set price of USD 70 per ton to a quarterly fluctuating rate of USD 53-56 per

⁴² In 2010, the Mongolian People’s Revolutionary Party (MPRP) changed its name to the Mongolian People’s Party.

ton (InfoMongolia, 2013). As Chalco was the only buyer at the time from Tavan Tolgoi, a growing sense of Mongolia's seeming inability to dictate favourable export prices created a strong sense of urgency amongst citizens and some politicians.⁴³ This anxiety was exacerbated by Chalco's almost simultaneous attempt to purchase a majority share in the Ovoot Tolgoi coal deposit, for which Turquoise Hill held a mining license. This attempt was blocked by the government, as 'this merger would have made a single Chinese state-owned company both the owner and the buyer of the mine's resource' (Oxford Business Group, 2013: 115).

The fact that by 2012, China had commandeered 90% of Mongolia's total minerals export market provides a geopolitical explanation for resistance to China's 'growing economic hegemony' (Edwards, 2013) in the Mongolian market. The Strategic Entities Foreign Investment Law (SEFIL) was passed in May 2012, asserting a strong political role for the state in relation to FDI, particularly that coming from foreign, particularly Chinese, SOEs. The Law introduced the concept of "strategic sectors", which included banking, telecommunications and finance in addition to mining (ibid). The more controversial provisions of SEFIL included:

1. the requirement of Cabinet approval to purchase shares above 33% in a company in a strategic sector,
2. the requirement of Parliamentary approval for a.) state-owned investors to purchase a majority share in a strategic entity and b.) state-owned investors planning to invest

more than 100 billion *tugriks* (approximately USD 71 million) (Edwards, 2013)

3. Cabinet approval for any transaction that had the possibility of controlling or diminishing the market price of mineral exports (Viverito and Hankin, 2014)
4. Disclosure of 'ultimate beneficial shareholders' (Hogan Lovells, 2013)
5. Mandatory notification of equity holdings of more than 5% in "Business Entities of Strategic Importance" within 180 days of the law's entry into force (13th November, 2012).
(ibid)

In addition to these provisions, the government was given a variety of new prerogatives regarding the appointment of boards of directors of strategic business entities (Viverito and Hankin, 2014). Most commentators on SEFIL at the time portrayed it as a blatant overstepping of the public-private boundary and an illegitimate exhibition of resource nationalism.

In October 2012, following the parliamentary election, the new coalition government led by the Democratic Party attempted to renegotiate the Oyu Tolgoi Investment Agreement under the provisions of SEFIL. Importantly for this analysis, a major part of the government's intention at the time was to 'unfreeze' the tax and royalty rates that had been stabilised in 2009 (Kosich, 2012) in order to cover a growing fiscal deficit in the 2013 Budget. The proposed changes included a sliding royalty rate on copper, up to 20% depending on the market price, as opposed to the fixed rate of 5%, and removing exemptions from corporate income tax (Macnamara, 2012). This attempt to increase state revenue from the project was rejected by Rio Tinto and Turquoise Hill, and

majorly impacted Mongolia's reputation as a stable destination for investment. As Oyu Tolgoi functioned as 'litmus test' (Falconer, 2013) of Mongolia's investment potential, the *perception* among investors of Mongolia's stability became a critical factor for capital flows. At the time, a senior U.S. diplomat predicted that,

If there appears to be an attempt at renegotiating or somehow reneging on the investment agreement, that could have a potentially catastrophic effect on the country. It could stop the flow of foreign capital into Mongolia. (David Wyche, Economic Section Chief, U.S. Embassy quoted in Macnamara, 2012)

In the year that followed, the Mongolian government resolutely continued to challenge Rio Tinto about "missing revenues," with allegations of tax evasion. The government blocked the mine's first shipment of copper in June 2013 on the basis of '77 points of dispute,' including tax evasion, Rio's management fees and cost overruns upwards of USD 2 billion. The government cancelled its double-taxation treaty with the Netherlands, among others, claiming that the foreign stakeholders in Oyu Tolgoi were using Turquoise Hill's office in Amsterdam as a tax haven (Deutsch and Edwards, 2013).

Critically, the dispute with Oyu Tolgoi came down to an issue of control over the timing of the project. The USD 2 billion accrued to the project through cost overruns not only increased the government's debt, but increased the "management service fee" – 3-6% - associated with these "investment costs." While Rio Tinto was frustrated by the delays, the cost to the government was immediate with a virtual walk-out of investors, particularly Euro-

American companies.⁴⁴ As the U.S. Embassy's 2013 Investment Climate Statement (U.S. Embassy, 2013: 3) stated,

Doubts persist over the [Government of Mongolia's] commitment to honouring the Oyu Tolgoi Investment Agreement and its ability to manage public expectations over mining revenues and related development.

A senior Mongolian policy-maker who was generally supportive of foreign investment later reflected that these 'shareholder issues' were unfairly inflamed into major reputational damage for the government:

We don't have capacity to do some communication strategy, we don't have a system to [communicate] to international financial markets. And afterward, they (investors) see the trouble through the lens of Rio Tinto because investors think the government of Mongolia is stupid... delaying things. But it was [the] opposite.

In addition to SEFIL and attempted renegotiation of the OTIA, the cancellation of mining licenses due to environmental legislation and corruption allegations further damaged the state's relationship with foreign investors.

In 2009, the Law on the Prohibition of Mineral Exploration and Mining Operations at Headwaters of Rivers, Protected Zones of Water Reservoirs and Forested Areas was passed in Parliament,

⁴⁴ Somewhat ironically, SEFIL and other measures intended to give the state greater control of the mining sector (particularly from Chinese state investment) pushed Mongolia into greater dependence on Chinese investment and finance. China provided critical financial support during the investment crisis and commodity price slump (2012-2013) when FDI contracted. While Chinese demand for Mongolian coal had slowed, it did not suddenly withdraw capital following the "resource nationalist" decisions of the Mongolian government. Instead, Chinese SOEs exploited Mongolia's dependence by offering long-term purchase agreements for commodities at 'deeply-discounted' rates, sometimes as low as 11% of 'global benchmark prices' (Wernau, 2017).

following years of environmental activism to place firm limits on mining activity in these areas. Led by small rural associations of activists known as the River Movements, the appeal to strengthen environmental legislation generated widespread public concern, culminating in letter-writing campaigns across the country and large symbolic demonstrations in Chinggis Square. The government initially did not implement the legislation because it was perceived as too expensive; not only would the state be responsible to compensate license-holders, it would significantly impact Mongolia's gold industry by restricting alluvial gold mining. However, in 2011, following public pressure and at the Supreme Court's order, the government cancelled licenses for over two hundred mining projects that contravened the boundaries set out in the new legislation (U.S. Embassy, 2011: 24). Gold production, which had been contributing up to 20 tonnes of gold per year to the Bank of Mongolia's gold reserve, declined to 4-5 tonnes after the enforcement of the legislation (Fehrbach, 2013).

According to the President of the Mongolian National Mining Association, the environmental law 'affected almost 1800 licenses... which should be revoked and compensated' (author interview). The enforcement of the law was generally met with enthusiasm from the public at the time, particularly among the growing number of environmental activists and citizens concerned about the impact of mining on Mongolian territory. As public debates have shown, the main sources of 'public discontent' (Mendee, 2013) about the regulation of the mining sector were based on environmental damage and corruption in the mining sector. In contrast, the enforcement of this law 'caused intense opposition from miners' (ibid). The legislation amplified the growing pressure on the state between its voting constituency and the investment sector, as public expectations for stronger

regulation of the mining sector conflicted with those of investors, who demanded reassurance that the state was committed to protecting their rights and interests.

In the same period, the government also introduced a new nuclear energy law, which led to the deregistration and non-renewal of a uranium mining licence held by Canadian mining company Khan Resources in 2010. Khan Resources filed for arbitration proceedings in the United Nations Commission on International Trade Law (UNCITRAL) against the Government of Mongolia under the Energy Charter less than a week after the revocation of their license. Khan filed for arbitration on the basis of indirect expropriation, fair and equitable treatment, arbitrary measures and the umbrella clause of the Charter.⁴⁵

Investor concerns were further exacerbated when corruption charges brought against senior officials of the Minerals Resources Agency led to the official cancellation of 106 mining licenses in November 2013 and a moratorium on granting further licenses following the investigation. The illegality of the issuance of the licenses did not assuage investors, many of whom openly challenged the cancellation of the licenses as a blatant expropriation by the state of their property rights and a failure to honour contracts. The President of Kincora, a foreign-invested copper and gold mining company, stated that ‘security of tenure and a transparent legal system are key cornerstones for both domestic and foreign investment’ (Reuters, 2013).

2013- 2015: A “Learning Curve”?

“Well, previously there was a supercycle in the minerals sector everywhere – prices were very high, everyone could do business, everyone was satisfied, everyone was

⁴⁵ See Khan Resources v Mongolia (PCA Case No. 2011-09).

too confident. Too confident, companies [and] government... And there was a strong sentiment of nationalism – “Mongolia should have a bigger stake in everything” – everyone was too confident. The legal changes at that time were too harsh. But recently the boom ended and now we are having difficult times. These hard times they are lessons. The biggest lesson was that we need investment, we need to support business activities, and in order to create a favourable environment to support business, we need to have very close discussions with our industry representatives, investors and other stakeholders including academicians, civil society, international organisations who are big advisors to us... The legal reforms were done not only in [the] minerals sector, but in the general economy as well. We have revised our investment law. Previously we had a law on...foreign investment in strategic sectors [SEFIL] which was a very harsh law that restricted, controlled everything. We changed the investment law, we created a new investment fund law, we created capital markets law, also we have [a] great law on fiscal stabilisation funds and many others. So this is one direction [the] government took to help the industry: legal reform.” – Director, Strategic Policy and Planning Department, Ministry of Mining (author interview)

There was an immediate response from foreign investors to the perception of instability in the investment environment, with a sudden decline in FDI between 2012 and 2014. The sudden withdrawal of foreign capital from the economy put Mongolia on the brink of an economic collapse. While Mongolia was hailed as a “growth generator” only the year before, total revenue accumulated in 2012 was 12.1% below the budget projection, with mineral revenue 35.6% below the previous year. Total exports fell by 9% and FDI dropped by 17% (World Bank Group

Mongolia, 2013: 4). In 2013, FDI almost halved – dropping 49% - and continued to spiral in the first half of 2014. In May 2014, Mongol Bank reported a 64% year-on-year drop in FDI (U.S. Department of State, 2014: 1). Desperate to maintain capital liquidity, the Mongolian government negotiated another three-year currency swap agreement with China, this time for USD 2.18 billion (Yamada, 2017).⁴⁶

In response to this apparent crisis of FDI, Mongolia legislators passed a new investment law by the end of 2013 with the assistance of the International Finance Corporation of the World Bank Group. The development of this piece of legislation was widely understood as a direct attempt by the government to repair Mongolia's damaged reputation and 'attract fresh capital in the mining sector' (Els, 2013). The stated purpose of the new investment law in Article 1 was to explicitly

protect the legal rights and interests of investors in the territory of Mongolia, to establish a common legislative guarantee for investment, to encourage investment, to stabilise the tax environment, to determine the rights and obligations of investors and the competences of a government body related to investment.

Foreign and domestic investors were given the same treatment under the new law, taxation rates returned to previously low rates, a wider range of tax and non-tax incentives made available

⁴⁶ As China is Mongolia's largest trading partner, the *yuan* can be used in relation to Mongolia-China trade settlements, thus protecting other foreign currency reserves (Yamada, 2017). Mongolia's swap agreements with China essentially function as a credit line to finance Mongolia's trade deficit. The Bank of China also set up an office in Mongolia in 2013, which invests in infrastructure, energy and mining companies. By 2014, approximately forty companies had applied for USD\$ 3 billion worth of loans from the Bank, according to a Bank report cited in a national newspaper (Bayarsaikhan, 2016). While the Bank of China has not opened an official branch, there are concerns about the devastating impact such a move could have on Mongolia's financial sector, which would easily be undercut by the lower interest rates of the Bank of China (ibid).

to investors, and investors gained new rights to avail themselves of international arbitration. The reduction of taxes and re-introduction of stability agreements resembled the liberal provisions of the 1997 Minerals Law. Notably, the new Investment Law significantly restricted the remit of government's involvement in mining projects. Government competence was strictly placed within the remit of a 'central administrative body' (initially the Ministry of Economic Development) with implementation functions centralised in an agency, significantly limiting the previously primary role of Parliament with regard to investors. The new law removed screening and no longer required government approval on private foreign investment, in what were previously considered nationally strategic areas under SEFIL (Hogan Lovells, 2013c). Only foreign companies over 50% state-owned and investing at least 33% into minerals, communication or financial sectors – the former 'strategic' sectors – were obligated to go through a government approval process (Hogan Lovells, 2013). The Invest Mongolia Agency, as the implementation arm of the government, was placed in charge of the approval process (Invest Mongolia Agency, 2014: 60), thus effectively streamlining decision-making into a one-step process at most. Article 6.10 protects the Investment Law from hasty amendment by requiring a two thirds majority of votes in Parliament, in contrast to the prevalence of low quorum rules (Munkhsaikhan, 2016; Enkhbaatar et al, 2015).

The explicit mandate of the Invest Mongolia Agency under the 2013 Investment Law is to resurrect investor confidence in the Mongolian market by providing an in-house government service to 'streamline' decision-making and assist access to preferential financial arrangements for investors: helping 'both foreign and domestic [investors] – in planning their investments and to protect their interests and rights' (IMA, 2014: 62). Its main

functions include the international promotion of the investment climate and opportunities in Mongolia, the provision of consultation and ‘one-stop online services to foreign investors,’ supporting FDI and registering new foreign investments. A significant part of the IMA’s promotional activity since 2013 has been raising awareness about new changes to Mongolia’s tax framework that make it ‘competitive.’ For example, in the IMA’s 2014 Investment Guide, it boasts that ‘Mongolia is one of the countries with the lowest tax rate in the Asia Pacific region with 10% and 25% for corporate income tax, 10% for individual income tax and VAT rate of 10%’ (IMA, 2014: 28). Further to these standard low rates, the IMA aims to assist investors to access the numerous options available to relieve both tax and bureaucracy burdens (i.e., ‘an alleviated regime of registration and checkpoint’ (Investment Law, Article 12.1.2)). It guarantees the option of an investment agreement to any entity investing above 500 billion tugriks (approximately USD 250 million), within which taxes may be stabilised for periods exceeding those laid out in the Investment Law (Article 16.2.1, see Table Two).

Table Two: Tax Stabilisation Periods Based on Region and Investment Amount (Source: IMA, 2015: 31)

Investment Value (MNT in billions)					Stabilization Timeframe	Invest the Amount within (years)
Ulaanbaatar	Central Region	Midwest Region	Eastern Region	Western Region		
10-30	5-15	4-12	3-10	2-8	5	2
30-100	15-50	12-40	10-30	8-25	8	3
100-200	50-100	40-80	30-60	25-50	10	4
200 and more	100 and more	80 and more	60 and more	50 and more	15	5

Furthermore, entities operating within economic free zones do not have to pay any tax for the first five years under the terms of the 2013 Investment Law (IMA, 2015b: 4). Notably, Mongolia’s

main Economic Free Zone – Zamyyn Uud – is a port on the border with China, a major export route for the mining-intensive South Gobi region. Non-tax benefits include ‘longer land lease rights, residential permits for international investors and their families, expedited registration process if the investment involves a free economic zone or industrial complex, and financial guarantees for investment projects involving innovative technology’ (IMA, 2014: 67).

In addition to the Investment Law and new agency, Mongolia’s urgent need for capital led to the swift passing of several significant pieces of legislation to develop its capital markets (Surenjav and Buxbaum, 2015: 323). This included ‘managerial and technical reform’ to the Mongolian Stock Exchange to comply with ‘international standards’ through amendments to the Market Security Laws (ibid). These amendments introduced ‘a greater variety of financial instruments, including options, futures, derivatives, and convertible securities’ (ibid 324), contributing to the development of Mongolia’s market ‘infrastructure’ (ibid). Additionally, an Investment Fund Law was passed to enable private investment funds, where domestic investors can raise capital on global markets and take advantage of reform to the Mongolian Stock Exchange (ibid). Private investment funds were perceived as ‘a positive development in increasing the liquidity of Mongolian capital markets,’ (Hogan Lovells, 2014), generating a.) new investment opportunities for shareholders, and b.) the hope of making companies more profitable and less vulnerable to bankruptcy.⁴⁷

These efforts to deepen access to capital markets and provide domestic frameworks for more complex financial mechanisms

⁴⁷ This was arguably most important for Mongolian companies, which have tended to lack ‘sufficient financial capability’ (N. Enkhbayar, author interview) in terms of the reliability of their own capital assets.

made progress towards bringing Mongolia's domestic market environment up to "international standards," the desired basis of global trade being the free movement of capital and predictable rules. In light of these changes, 'some foreign investors are beginning to argue that the difficult times have actually been good for the market' (Oxford Business Group, 2014). Presumably the benefit of the 'difficult times' lies in their persuasive effect on the state to reconsider the cost of its interventions in the market.

In 2014, the minerals law and policy framework underwent comprehensive reform. A new State Policy on Minerals (2014-2025) was approved by Parliament in January, with the main stated objective being 'to establish a *stable investment environment*, to improve the quality of minerals exploration, mining and processing by encouraging advanced equipment, technologies and innovations with low negative impacts on the environment, to produce value-added products and to *strengthen competitiveness in the global market*' (Article 1.2, emphasis added). In addition to new institutional mechanisms to protect the investment environment from the destabilising influences of Parliament and local authorities (the subject of the next chapter), the State Minerals Policy prioritised 'private sector-led development.' This entailed not only positive support for investors, but an active reduction for the state's role in relation to the market. As the Director of the Department for Strategic Policy and Planning (author interview) put it,

Government should participate only as a tax collector and, of course, rules and standards enforcing agency... there is a strong sentiment among people – ordinary people – that government officials should not be involved in management of business operations of a company. Everything must be done by private sector. Private people will be much more rational...

This point of view was affirmed by a senior legal specialist at Erdenes Mongol LLC (author interview), the state-owned mining company representing the government of Mongolia's interests in its fifteen nationally strategic mineral assets:

All the stakeholders together worked on this document [State Policy on Minerals Sector 2014-2025]. So it is [a] very important document to make sure that investment is attracted, and that state-owned companies can work effectively, efficiently... The point is that the government is trying to move the industry forward because it is a very important industry for the country's economy... since Mongolia is a market economy, so also the private sector [has a] very important role in the economy and industries, in development. So it is quite a liberal policy document, which means that it is open to all the partners, all the parties, investors, including all of the investment community. So not only the local community but the international community.

The significance of Erdenes Mongol as the SOE representing government interests in the economy has put the company under the limelight of reform since 2014. Previously, Erdenes Mongol had been designed to function as a type of sovereign wealth fund, financing the Human Development Fund through dividends. Since 2014, Erdenes Mongol has been in a restructuring process, so that it can operate with a 'commercial mandate' (ibid), to put its daily operation beyond the immediate influence and control of its government shareholders (i.e., the Prime Minister, Ministry of Finance, Mongol Bank, Ministry of Mining). The CEO of Erdenes Mongol, B. Byambasaikhan, has placed priority on disentangling the enterprise from the direct influence of the government provided the leadership for this transition, tantamount to a semi-privatisation of Mongolia's most significant SOE. Byambasaikhan stated in a media interview (News.mn, 17th March 2015) that

‘government involvement in business and the negative international perception of this’ was the primary issue to be overcome in terms of reforms.

While the language of privatisation was resisted in the author’s interviews with three senior representatives at Erdenes Mongol, the model upon which the restructuring was guided is that of Temasek, the Singaporean Holdings company. The Temasek model effectively delinks the operation of SOEs from the government through a Shareholder Representative, who appoints the board of directors, instead of Cabinet and Ministries. This should be understood as a partial privatisation of state property and governance, because it aims to remove the state’s direct, political involvement from the operation of the company, rendering a “public” company virtually indistinguishable from private companies in order that it can compete more effectively in the market. According to senior experts at Erdenes Mongol, the bureaucratic checks and balances, and inability to adapt quickly enough to market signals, were the reasons for the shift to a commercial mandate. The emphasis on private-sector led development and the new push to privatise, at least partially, many SOEs more generally reflects an overall trend since 2014 that ‘the government should not participate as a shareholder’ (Director, Strategic Policy and Planning Department, Ministry of Mining, author interview).⁴⁸

The 2006 Minerals Law was amended in July 2014 to reflect reformed priorities in the minerals economy, favouring the private sector. A summary of changes as they relate the role of the state and investor interests are detailed in the following table:

⁴⁸ Notably, in 2014, Parliament decided against participation in a ‘strategically important deposit’ – Tsagaan Suvraga – reflecting a shifting sense of political will along with policy reform.

Table Three: Investor-State Balance in the 2014 Amendments to the 2006 Minerals Law (see Minter Ellison, 2014; Hogan Lovells, 2014b)

Investor Benefits	Role of the State
Scope of mining activity reduced from 8% to 20% of the total territory	Direct stakes in mining projects exchangeable for special royalties, depending on negotiations with the license-holder
Reduced restrictions on license trading	Formalisation of local development agreements (made mandatory)
Newly issued licenses may be immediately transferred	Financial burden of limiting mining shifted to local authorities: confiscation of licensed areas under the terms of ‘specially protected areas’ have to be compensated by the local authority <i>within a year</i> , otherwise mining operations may continue
Stream-lining procedures for obtaining licenses	
Replaces former grounds for license cancellation with fines	
Introduced a 30-60 day time-limit on government decision-making to reduce bureaucracy	
Reduction of taxes:	
➤ Royalty on gold reduced from 10% to 2.5%	MRAM and Ministry of Mining to pre-determine areas for exploration
➤ Elimination of taxes on imports, equipment, machinery until 2018	Prerogatives of the Ministry of Mining

significantly expanded,
particularly regarding the
approval of regulation
related to mine
processing, environmental
rehabilitation, the
collection of geological
data, the qualification of
official experts and
analysts, the classification
of resources and public
reporting (Article 10.1 and
sub-provisions)

The 2014 changes to the legal framework in the minerals sector also addressed the moratorium on license issuance, which was ‘simultaneously repealed’ (Hogan Lovells, 2014b: 1) with the amendment of the minerals law. Mineral licenses for exploration and exploitation were available again on a first-come-first-served basis, reverting back to the “competitive” standard of the 1997 Minerals Law. Furthermore, the Law on the Prohibition of Mineral Exploration and Mining Operations at Headwaters of Rivers, Protected Zones of Water Reservoirs and Forested Areas was significantly revised. Operations in headwaters or river basins remained restricted, but limited mining was permitted again along rivers and in forested areas. The amendments to this environmental law have a clear economic explanation: ‘there is no money to compensate’ the revoked exploration and exploitation licenses (President of the National Mongolian Mining Association, author interview).

Apart from legal and policy changes, the Mongolian government made significant efforts to heal its reputation within the

international investment community. This effort has been particularly prominent since the start of 2015 when Prime Minister Chimed Saikhanbileg assumed the office after his predecessor was ousted for his alleged lack of effort to resurrect investor confidence in the minerals sector (Reuters, 2014). PM C. Saikhanbileg and other senior politicians, including B. Byambasaikhan, CEO of Erdenes Mongol, actively courted the international investment community through demonstrations of contrition for past “mistakes.” For example, the Mongolian government agreed to pay Khan Resources more than USD 80 million in damages for revoking the company’s uranium mining license, following UNCITRAL’s decision in the *Khan Resources v Mongolia* case in March 2015. Shortly thereafter, in April 2015, in the run-up to the Dubai negotiation of the ongoing Oyu Tolgoi dispute, the Prime Minister faulted the Mongolian government for ‘lost credibility’ in the international market (Reuters, 2015).

The resolution of the dispute between the government and Rio Tinto over Oyu Tolgoi in 2015 – known as the Dubai Agreement – was a crucial part of the government’s effort to restore investor confidence in Mongolia’s mining sector. The Dubai Agreement was widely seen by the government and investors as a success, providing a basis of unity among private and public stakeholders about the second phase of mine development for Oyu Tolgoi. It was also interpreted as a positive signal for other investors, as Oyu Tolgoi continues to exercise broader influence as a barometer of political for investment in the mining sector in general (Falconer, 2013; Macnamara, 2012). The “success” of the Mongolian negotiators in Dubai in terms of resolving the dispute between Rio Tinto and the Mongolian government was their ability to demonstrate the “economic facts” that showed the

impacts of nationalistic decision-making on investment levels.⁴⁹ A business approach – rather than a political approach – was seen as necessary to prevent further reputation damage for the country. USD 30 million was paid to the Mongolian government by Rio Tinto to settle the tax dispute, 10% of the original claim, and a two percent tax that the stakeholders inherited from BHP – a source of dissatisfaction on the Mongolian side – was eliminated. A methodology for the calculation of royalties and income tax was agreed upon, that it should be calculated on the basis of gross rather than net profits.

While many perceived these outcomes as a win for the government against Rio Tinto, others were less convinced. A former advisor to the government in the original Oyu Tolgoi dispute explained that these concessions should not be seen as ‘big victory’ because they are not comparable to other concessions that remain sealed in the investment agreement, such as the Investment Tax Credit and Management Service Fee provisions (author interview). However, as low tax barriers and liberal investment conditions are key to Mongolia’s competitiveness in the global minerals market, the Dubai Agreement was widely perceived as a necessary step towards regaining credibility among investors. As PM Saikhanbileg announced,

⁴⁹ B. Byambasaikhan, CEO of Erdenes Mongol LLC, was particularly influential as the ‘internationally experienced’ Mongolian negotiator representing the government’s interests in Dubai (INS, 2015). He has a strong reputation as an internationally oriented businessman, with previous experience in banking (Asian Development Bank), investment and advisory services as Director of NovaTerra LLC, and as President of the Business Council of Mongolia. In contrast to previous negotiators for the government in relation to Oyu Tolgoi, Byambasaikhan is known for his positive approach to foreign investment and support for the restructuring and privatisation of SOEs. In August 2015, following the Dubai Agreement, Byambasaikhan was appointed to the Board of Directors for Oyu Tolgoi. See Oyu Tolgoi, Board of Directors, 2017.

Mongolia is back to business. Oyu Tolgoi is a world-class copper-gold asset and its further development is of great economic significance for Mongolia. We have finalised a way forward with our partners which re-establishes the foundations of a new and constructive relationship based on mutual trust and our joint long-term commitment to Mongolia's growth (Rio Tinto 2015, Press Release).

Conclusion

Through a chronological schema, this chapter has focused on key shifts and dynamics that have reordered the state-market relationship in the minerals sector. Eschewing the paternalistic narrative of 'learning from mistakes' that has dominated the media discourse of the government's action in the minerals economy, this chapter has set out to highlight the growing power imbalance between the government and investors since 1997. The initial optimism about free markets quickly led to disillusionment among the Mongolian public, as the state's minimal regulatory approach generated a host of new environmental and social issues. The public's concern over the benefits that would accrue to citizens through the exploitation of natural resource put pressure on the government to take a stronger hand in the economy. There were surely elements of state-interest at work in the 2006 changes to the legislative and policy framework around minerals, as political parties vied for control of exploiting Oyu Tolgoi. However, a purely "resource nationalist" frame discredits the responsiveness to the state's voting constituency that gave these decisions a basic democratic legitimacy.

The assertion of a larger role for the state in the minerals sector in 2006 indicates that re-regulation of the sector was perceived as a viable option at that point. However, the government

demonstrated a lack of awareness about the way market liberalisation had created new pressure points on the state through the mechanism of foreign direct investment, giving investors economic leverage against the state. This leverage did not operate forcefully until the signing of the Oyu Tolgoi Investment Agreement, when the mineral sector's share of GDP and exports pushed Mongolia officially into the category of mineral dependence. After an initial period of optimism following the OTIA in the context of the commodity boom, we can see the ways in which the government has since been forced to withdraw or ameliorate its efforts to influence the sector based on geopolitical, environmental, or corruption-related concerns. Mongolia's initial entry into the global minerals economy through the 1997 Minerals Law was associated with a liberal investment environment, a key element of the country's comparative advantage. While more powerful countries like China, Australia and Indonesia have been able to raise taxes during the decline in commodity prices since 2011 without reprisal, Mongolia has had to re-liberalise its taxation framework, particularly given the financial vulnerability of domestic companies: 'we don't have the option to increase taxes during hard times' (Director, Strategic Policy and Planning Department, Ministry of Mining, author interview). Part of Mongolia's competitive strategy to undermine its rivals in the minerals market is to lower taxation and create favourable conditions for the mining industry.

The push-back from foreign investors over the state's management of its two landmark mining projects – Oyu Tolgoi and Tavan Tolgoi – emphasised the nationalistic approach of governmental action. However, even influential pro-market government officials expressed 'mixed feelings' about this narrative because of the way it vilified the Mongolian state. As one senior policy-maker put it,

In the UK, say you have a project as big as your economy and 34% is funded by tax-payers' money. The other foreign contracting party [to the project] increases the cost, and your debt increases. I assume tomorrow that there will be riots... In Mongolia there was the same reaction, but it was seen as resource nationalism (author interview).

Similarly, a former economic advisor to N. Altankhuyag during his term as Deputy Prime Minister (2008-2012) reflected on Altankhuyag's leadership when he assumed the office of Prime Minister from 2012-2014, during the FDI crisis.⁵⁰ The advisor explained that the 'hard line' that was taken in the Oyu Tolgoi dispute was out of genuine concern for the public interest and did not reflect a lack of support for foreign investment in general (ibid). Commenting that Mongolia's tax regime was very 'pro-mining,' he acknowledged having a mixed response to the stabilisation of tax, perceiving it as a major concession to investors:

Okay, I see the rationale – economic rationale. Because Mongolia is a small country, it could be unstable. In order to attract money, maybe we have to promise stable tax rate... But on the other hand it is kind of unfair, because, say we [Mongolian citizens] have an emergency. Sometimes the government has to raise the tax. Then other regular non-mining sector could be levied higher tax, but those guys with the stability agreement wouldn't pay extra, right? (ibid)

While many government representatives involved in mining policy-making interviewed by the author were generally critical of the reactive decision-making that characterised 2012-2013,

⁵⁰ Not surprisingly, Altankhuyag's term as Prime Minister has been associated with the state's turn towards resource nationalism. After FDI continued to spiral downwards in 2014, Prime Minister N. Altankhuyag was removed from office by a parliamentary vote of no-confidence on the 5th of November.

they painted a nuanced picture of a state caught betwixt an increasingly anxious voting constituency and pressure from investors.

The reforms since 2014 under the new State Minerals Policy establish a “complementary” division of labour for the state, whose domain is the production and enforcement of rules to enable ‘private-sector led development.’ Investor expectations for the type of legal and political pre-requisites for investment in the Mongolian mining sector may be backed by coercive financial power through the mechanism of FDI, but their power has proved even more transformative than limiting the legal remit of the state’s role in the minerals economy in the short term. The episode of bold – “bad” – decision-making in 2012 and early 2013 shifted the state’s own discourse about itself, at least in the public domain. A striking example of this *mea culpa* discourse was evidenced in 2015, when Prime Minister Saikhanbileg appeared on national television to explain an SMS referendum in which Mongolian citizens were invited to vote on whether they wanted ‘to step up austerity measures or do whatever it takes to get the country’s mining sector growing again’ (Edwards, 2015). This dichotomy between austerity and prosperity was sustained by a presumption of the objective status of the market and the limited options available to the state operating in relation to it.

The following chapter will engage with the specific ways in which three key sources of “political risk” to the mining sector have been “stabilised.” Parliament, local governments and rural environmental NGOs resisted mining investment in different ways between 1997 and 2014, as institutional agents of disruption to Mongolia’s global economic transition. These institutions sit along critical axes of reordering, determining intra-state (central, and central-local) and state-society relations.

The “stabilisation” of these institutions following the FDI crisis is significant; the next two chapters empirically demonstrate the way that power was redistributed within the central state, the principle of self-government (central-local state relations) was reinterpreted, and the boundaries of political contestation were reformulated, in order to designate Mongolia as a stable destination for FDI. Notably, these processes of minimising and excluding certain political institutions and actors were juridical and technical-administrative rather than overtly political.

Chapter Four

Stabilising Instability for Investors: New Axes of Reordering for Mongolia's Extractive Political Economy in the Post-2014 Consensus

Introduction

[Mongolia has been adjusting to] democracy and capitalism in the past twenty years...They're learning a lot so it's a steep learning curve, but they're adjusting and they do things right in many ways, it's just the politics gets in the way. The last twenty years have been an experiment.

Foreign CEO, Mining Company (author interview, January 2015)

The previous chapter gave a chronological overview of a transformative period in the governance of Mongolia's mining sector, from the genesis of an open investment regime in the late 1990s to an attempt to reassert stronger state interests within it (2006-2012), and the dramatic re-liberalisation process that followed after FDI dramatically fell (2012-2013). The stability of the political and legal environment became the object of reform in 2014 following the collapse in foreign direct investment and the global downturn in commodity prices, in the hopes of regaining investor interest and confidence. The collapse of investment flows and investor confidence in the Mongolian case was not the typical risk-aversion that can characterise investor behaviour during commodity busts, although that was surely present. It was characterised by a sense of lost *confidence* among investors that the government would respect the boundary between the state and the market.

Having established the broad trajectory of Mongolian mining governance since the post-socialist transition, this chapter takes a closer look at *how* particular institutional sources of political-legal instability were targeted for reform after the radical decline of investment interest in the Mongolian mining sector in 2012-2013. I argue that these “reforms” constitute a reordering of the state itself and its relationship with Mongolian citizens. While there may be more, three critical axes of reordering have been identified: 1.) the redistribution of decision-making power away from representative institutions of government towards the executive within the central state, 2.) the redefinition of the boundaries of self-government for provincial authorities, and 3.) the marginalisation of conflictual social movements from formal governance processes.

These axes are symptomatic of a process of deep change within the state because they relate to fundamental aspects of the national system of government such as the function of the separation of powers, the practice of self-government within the state and the scope of democratic politics (state-society relations). I argue that these transformations of the national state were an attempt to insulate the mining economy from political antagonism (i.e., expropriation by the state, protest etc.) and should be seen as a form of *de facto* constitutionalism, where – in relation to the mining sector – the principles of the national constitution have evidently been reinterpreted, revised or ignored in practice. Notably, this insulation has been effected through legal means and financial incentives, reinforcing the structural nature of this shift within the state itself. Viewing these apparently disparate processes through the lens of stabilisation – to create ideal conditions for FDI – illuminates the way in which distinctly global processes affect state institutions despite the formal continuity of its nationally constituted structure. In this

chapter, I will address the first two “axes of reordering” described above within the central state itself and between central and sub-national administrations. Specifically, I will discuss the way Parliament and local governments were targeted in the 2014 reforms in the mining regime. The following chapter will address the third state-society axis, regarding the marginalisation of social movements and the institutionalisation of environmental NGOs to prevent overtly “political” activism.

Unstable Institutions at the Centre and the Periphery: Curtailing Political Risk for Investors within the State

In this section I will address two different sources of “instability” within the state that have been targets for reform since the 2012-2013 crisis of investment capital and confidence. Both Parliament and sub-national (provincial and district) governments were problematized by pro-extractive interests for their “nationalist” and “corrupt” behaviour which had contributed an unacceptable level of political risk to the investment environment. The return to an open and competitive investment regime in 2014 under the State Minerals Policy (2014-2025) was accompanied by the transfer of authority from representative to executive spaces of the state or to new institutions to insulate the investment regime from unpredictable political influences. This trajectory was accompanied by the integration of private mining interests into the machinery of national governance, reflecting a shift within the state itself as well as a “cracking open” of its institutions to global market influence.

Conflict at the Core: Parliament, Politicians and “Resource Nationalism”

The Mongolian government finally realised that they really need foreign investors. Before it was more about

nationalistic sentiment, overwhelmingly, but I think they realised they need foreign investors to get this economy rolling... Hopefully politicians with a different view on things will start to get elected... [before it was] pretty nationalistic and let's kick out foreigners and what have you, and that starts to be negative politics. I hope it won't happen again. But in the meantime, the tugrik is suffering, their foreign currency reserve is dwindling, all the prices are going up right now, people are complaining... so there's a lot of pressure on the government to do things right (Interview, Foreign Mining Company CEO, January 2015).

The question of how to govern the minerals sector has been at the heart of democratic politics in Mongolia since the post-socialist transition. As the previous chapter indicated, the new democratic government was immediately confronted with a crisis of quickly depleting public capital, ballooning debt and the devaluation of the *tugrik* following the collapse of the Soviet Union. The Gold Programme and the speedy adoption of the 1994 Minerals Law both reflect the severity of the imperative to attract private investment in order to stimulate the failing economy. By the late 1990s, a consensus that minerals would be the national economic base had emerged, although this general consensus was characterised by an ongoing conflict about the precise limits of the regulatory role of the state. Following the post-socialist transition, the issue of the role of the state in economic regulation in general had been a major source of contention between the former socialist vanguard and the pro-market reformers (Rossabi, 2005). This conflict was intensified through the 1990s as the stakes of the mining industry, relative to the national economy, became much higher. Consequently, competing claims about which party would maximise national benefit from the mining industry became central to national parliamentary

election platforms, especially following the discovery of Oyu Tolgoi.

The authoritarian nature of the state during the socialist period had given the Great Khural more symbolic than actual power, as its representative role was fundamentally compromised by the absence of free elections or institutional accountability. The socialist era of rule can be characterised as a marriage of executive and judicial power (Butler & Nathanson, 1982), a fairly straightforward expression of 'socialist legality' dominated by the institution of the Soviet procuracy (Ginsburg, 1994: 81). Following the Soviet example (Butler and Nathanson, 1982: 83), the MPR established a State Procuracy in 1930 to supervise 'the observance of legality' (ibid) 'over all ministries, organisations and citizens' (Ginsburg, 1994: 81). As well as 'general supervision' (ibid), the Procuracy also exercised the power to prosecute, 'maintaining a close link with Party policies' (Butler and Nathanson, 1982: 83).

Democratisation and the constitutional separation of powers in 1992 consequently transformed the Great Khural into an active political institution in its own right (rather than being simply a handmaid of the MPRP), with representative legitimacy and law-making authority. In the democratic constitution, legislation can be proposed by both the executive and legislative arms of government, but representative power, vis-à-vis Parliament, controls the drafting and legislating procedure. Consequently, the Great Khural has become 'the highest organ of state power' (1992 Constitution, Article 20) in the democratic era. The right of single members of Parliament (MPs) to initiate legislation combined with low quorum rules, where as few as twenty MPs out of the seventy-six can pass legislation (UNDP, 2015: 23), has meant that law reform has historically played a key role in national politics.

As we will see in this chapter, one of the key reordering effects of Mongolia's foreign investment dependence since the FDI crisis has been the systematic attempt to insulate the mining regime from political forces of law reform. The speed with which legislation can be passed, amended and influenced by individual politicians has been widely portrayed as a major barrier to investment in the mining sector. Parliament has been the main source of risk for investors at the national level; as the legislative organ of the state, it has the most power to directly affect the national political and legal environment. With the hasty introduction of an entirely new piece of minerals legislation in 2006, the politicised negotiation of the Oyu Tolgoi Investment Agreement and, most significantly, the nationalist barriers to investment under the Strategic Entities Foreign Investment Law (SEFIL) of 2012, Parliament quickly gained the status of an unpredictable 'pariah' (Manthorpe, 2013) in the international media.

The close attention paid by investors to the 2012 Parliamentary elections indicated the anxiety felt by the state's new economic constituency about the membership of Parliament. According to an article in Resource Investing News, for example, 'uncertainty concerning just how far politicians are willing to move toward resource nationalism in an effort to win votes is understandably raising Mongolia's political risk factor in the eyes of resource investors' (Pistilli, 2012). Political parties have since been regularly criticised by international investment experts on emerging markets for their 'anti-FDI platforms' (Kohli, 2016), emphasising 'domestic politics' as the major 'obstruction' for investors rather than 'commodity or China risk' (Weafer, 2016). Resource nationalism has been consistently identified as one of the top five risks facing the major mining investors globally since

2011 in the Ernst and Young “Business Risks Facing Mining and Metals” reports (Ernst and Young, 2011-2016).

As Dierkes (2013) commented, ‘many non-Mongolians have focused on “resource nationalism” to explain the new laws... generally equated with some evil movement aimed at the nationalisation of resource assets.’ The actions of the Mongolian Parliament thus fed into a wider narrative of resource nationalism, shifting the country from its pre-2006 image as the ‘darling of international risk-takers’ (Manthorpe, 2013) to that of either ineptitude or deviancy from the expectations on states to “play fair” in the market.

Author interviews with foreign and Mongolian investors, pro-mining lobbyists and Ministry of Mining officials in October/November 2015 reinforced the negative image of Parliament. The President of the National Mining Association reflected on the controversy surrounding the Law Protecting Headlands, Water Basins and Forests, that it was members of Parliament and armed activist groups that had been ‘pushing’ the government to implement the law even though ‘it cannot be implemented’ because the state lacks the means to adequately compensate companies for the revoked licenses (author interview). Similarly, the President of the Mongolian Investors’ Association ultimately blamed Parliament Members for ‘wanting to get some name for themselves’ and secure electoral votes as the real force behind the environmental legislation:

*Instead of listening to the businesses who were the taxpayers, they started listening to the activists more.
(author interview)*

In relation to the State Minerals Policy 2014-2025, a senior official in the Ministry of Mining (Senior Policy-Maker, Ministry of

Mining, author interview) expressed concern that the strength of Parliament did not bode well for the stability of the policy, given that 'they have a right' not only to propose legislation but also draft it, the implication being that the final product might be quite different from the original proposal. A senior representative from Oyu Tolgoi similarly reflected that,

We hope it will be stable, but nobody knows... Mongolia has a permanently working Parliament which means they could change any law within four years. The last couple of years made clear that if we will not really support business to be run in a proper market situation, it will badly influence the whole economy (author interview).

Mr. Munkhbat concluded that 'for things to move properly and run in commercial ways,' it would necessitate 'less political involvement' (ibid).

Conflict at the Periphery: Local Governments, Mining Companies, and Corruption

Since democratisation in the early 1990s, local governments have become important institutional loci for democratic politics in Mongolia.⁵¹ Previously, under the Soviet-inspired socialist regime, all local authorities were appointed directly from the central government at the provincial (*aimag*), district (*soum*) and sub-district (*bagh*) level. As discussed in the first chapter, the governance of the pastoral economy was central to socialist economic development requiring a relatively high level of coordination and oversight. The 1992 Constitution ameliorated the system of direct appointment, by establishing a direct election

⁵¹ Mongolia is a unitary state, with 21 provinces (*aimags*) and 329 districts (*soums*), with a large and indeterminate number of sub-districts (*baghs*). Their precise number is unknown because they often lack a permanent site of government. The sub-districts bear the closest resemblance to pre-socialist customary institutions before nationalist territorialisation occurred in the 1920s.

process for local parliaments, which in turn nominate a governor. Each level of government is comprised of a governor's office and a local parliament (*khural*). While representatives in the local *khural* are directly elected, governors gain their positions through nomination by the *khurals* and then approval by the governor at the higher level of government. Thus, the Prime Minister approves provincial (*aimag*) governors, provincial governors approve district (*soum*) governors, and district governors approve sub-district (*bagh*) governors. This has been generally considered to be a formalistic process of approval and typically functions as a form of indirect appointment, as the nominee put forward by the elected representatives is usually approved. There have been cases where the governor of a higher order has rejected the nominee and the parliament refuses to nominate a new candidate, although this is rare. In the context of the democratic state, the relationship between local governments and the central state has consequently been quite ambiguous, because the 1992 Constitution balances both principles of 'self-governance and state management' (Lkhagvadorj, 2010: 79) in sub-national administration. This ambiguity often creates conflict between different levels of government about where the line gets drawn between their authority.

If self-interested nationalism has been the overarching characterisation of central Mongolian politicians and political institutions, the narrative of local governments in relation to mining has been one of corruption. As the previous chapter outlined, the role of local governments within the mining governance regime shifted considerably over its twenty-year development (1994-2014). Originally in the 1997 Minerals Law, there was a general legal obligation on companies to 'cooperate' with local authorities in relation to existing local development priorities. However, the 1997 'consult and coordinate' framework

gave local governments considerable room to negotiate the contributions of mining companies to local development without oversight from the central government. The ambiguity of the law and the informality of the arrangements gave governors significant political leverage. This leverage became a major “governance gap” to be addressed in the 2014 reforms to the minerals governance regime. It created space for local governments to express their dissatisfaction with, or make demands upon, mining companies in ways that conflicted with the central state’s interests in opening up provincial territories for extraction. The tension between central and local governments in relation to the mining sector was fuelled by two intertwined issues, relating to a lack of sub-national input in the licensing process and a lack of direct local benefits from mining revenue.

Since 1997, in relation to the sense of exclusion from decision-making, there was a mismatch between the centralised licensing process and the ‘decentralised’ approach to addressing the environmental and social impacts of mining. While local governments had significant freedom to negotiate with mining companies without central oversight, the licensing process was deeply centralised. The 1997 Minerals Law established a centralised regulatory regime for the mining sector that concentrated decision-making power in the executive spaces of the central state, particularly the Mineral Resources Authority of Mongolia (MRAM). The 1997 Minerals Law, designed to ‘regulate relations’ in the mining sector, only recognised one primary right local administrative bodies: ‘to permit the use of licensed areas for the purposes specified in the licenses, except where exploration or mining is prohibited or restricted by applicable legislation’ (Article 6.4.2). Under this law, MRAM was – and still is – expected to receive local government approval in order to issue

mining licenses. However, an officer at MRAM explained that, formerly, most local governments would 'disagree' with the proposed licenses (Officer, MRAM, author interview), although this allegedly did not always prevent their issuance in practice. A senior policy-maker at the Ministry of Mining (author interview) put it this way:

The main problem is the local governor. According to the Mineral Law, the first application – mineral exploration applications – we send to the local government to ask permission. In most cases they said no, no, no. So then how can mineral exploration licenses be issued? If we don't consider their [input], then they complain. So we make an assumption and say 'okay, we will issue the license.' The next day, the mining companies or exploration companies arrive on the land and they start drilling. So again, conflict. Local governors would say, 'We didn't give any permission. We don't want drilling.' This is the main problem... the process starts from the very top. The government has announced that these areas (are available for drilling) but at the bottom level [local government] there is conflict against this (author interview).

Secondly, the fiscal structure governing mining revenues was highly centralised in the first decade of the mining boom. Taxes, mining license fees and royalties were collected centrally and redistributed through the national budget on the basis of Parliamentary decision, advised by the Ministry of Finance (Lhakgvadorj, 2012: 6). This centralised system excluded local governments from both the 'budget planning and approving process' (ibid).

By the early 2000s, over 40% of Mongolian territory was covered by mining licenses (Suzuki, 2013). As noted in the previous

chapter, widespread environmental degradation and social dislocation catalysed the formation of the first rural social movements in the early 2000s which contested the preferential access to land and water given to mining companies through MRAM's lax licensing regime, which had led to the drying and pollution of rivers, a boom in artisanal mining and the subordination of herders' customary use rights to centrally administered mining licenses. These social movements were particularly associated with *soum* and *bagh* governors and chairs of local parliaments; their early success and political momentum has been linked to this capacity to forge strong networks with local authorities at all levels of sub-national administration. Many local governments were sympathetic to the groundswell of anti-mining sentiment among rural citizens, because they were also largely excluded from central processes of decision-making and accumulation, with mining revenues being redistributed through the central budget.

Without wishing to glorify local governments or deny the presence of personal interests, local authorities at both the provincial and district levels did respond to public concerns in a variety of formal and informal ways. In Mongolian land law, local authorities have the right to set aside land for 'special use' and to grant 'certificates of possession' to customary land users (i.e., herders) (Endicott, 2012: 97). These provisions were used strategically by authorities across the country as a form of indirect intervention to reserve land from mining and to protect herders' land entitlements in the absence of justiciable rights. More informally, governors were widely known to lobby mining companies to contribute to rural projects (i.e., building infrastructure, schools, financing social events) in return for approving various water and land permits for which local authorities' approval is necessary. There have also been

instances, particularly in the South Gobi, where local parliaments have banned access to groundwater for mining companies even when they formally have no legal prerogative to do so. While these decisions were overturned by the central government, they delayed projects in the short term and were a major source of anxiety and frustration for mining companies.

The resistant activities of local governments were typically framed by central policy-makers and mining companies alike as “corruption,” based on the personal interests of local authorities trying to squeeze benefits out of mining projects in their regions and manipulate the legal provisions for local agreements. One foreign CEO of a medium-scale mining company stated that ‘obviously community relations are about risk management’ (CEO, Foreign-Invested Company, author interview):

If they see a big mine with hundreds of trucks, obviously generating big revenue, they will say ‘where’s my piece, where’s my cut?’ They’re not going to be satisfied with government royalty and tax.

The President of the Association of Investors in Mongolian Mining, also the CEO of a Mongolian mining company, similarly framed local governments as putting onerous and superficial demands upon them (author interview). He stated that, ‘local government or local people want many different things,’ characterising local governments’ demands as purely self-seeking: ‘They want to travel to London... [They say] I’m governor of this village, right, so my wife needs the mink coat, so you bring me the mink coat’ (ibid). The lack of clarity about which level of government companies should liaise with (i.e., provincial or district) was described as confusing and exhausting for the companies, and as a loophole in the governance regime that facilitated rent-seeking. Similarly, environmental legislation

passed in 2009⁵² was perceived by mining companies as creating uncertainty in the legal environment because it gave discretionary privileges to local governments to determine environmental boundaries. The purported vagueness of the legislation and the lack of detailed regulation allegedly created too much room for subjective judgment, particularly by sub-national governors who had the power to determine ‘upper limits’ to mining near rivers, above and beyond the 200 metre boundary established in the law (US Embassy, 2011: 24). This legislation was the subject of revisions by the government following the crisis of foreign investment, as part of the broader effort by policy-makers to increase regulatory certainty for mining companies and to increase gold production, which had dropped significantly following the enforcement of the legislation in 2011 (Fehrbach, 2013).

Senior officials from the Ministry of Mining reinforced and legitimised the negative perspectives about local government held by mining companies. The Director of the Department for Strategic Policy and Planning acknowledged openly that ‘there have been cases where local governments demanded too much from mining companies,’ describing the needs of rural citizens and authorities as ‘infinite’ (author interview). These comments were in the context of discussing central state strategies to ‘make fences, limitations for local government’ (ibid). This paradigm of local governments as corrupt and self-interested also dominated policy discussions about company contributions to local development. At a World Bank and Ministry of Mining co-sponsored workshop discussing the draft model of Local Development Agreements in November 2014, for example, local governments and citizens’ *khurals* were charged with short-term

⁵² Law on the Prohibition of Mineral Exploration and Mining Operations at Headwaters of Rivers, Protected Zones of Water Reservoirs and Forested Areas, see Chapter Three.

thinking, rent-seeking and misuse of local development funds, over-charging mining companies for land, lack of legal knowledge and corruption, and very poor capacity for decision-making thus requiring the oversight of the central government (author observation, Multi-Stakeholder Workshop on Community Development Agreements).

However, the corruption narrative ignores the ways that local governments were actively responding to the concerns of citizens about foreign access to mineral resources, displacement from customary land and environmental degradation caused by mining. The alleged cases of caricatured corruption (i.e., demanding flights and mink coats) ignore the more substantive and systematic responses that local governments made to limit extraction in their regions in response to pastoral land-use requirements and environmental concerns, or by requiring companies to invest in local infrastructure (i.e., hospitals, roads and schools).

Stabilisation Mechanisms: Blurring Public-Private Boundaries and Strengthening Executive Authority in the Mining Governance Regime



Photograph One (left):

The Great Parliament (*Ikh Khural*) of Mongolia in Ulaanbaatar (author's photo)



Photograph Two (right):

Provincial government building in Sukhbaatar city, Selenge *aimag* (author's photo)

As institutions perceived to have generated instability for mining investment, both Parliament and local governments were targeted for reform under the State Minerals Policy 2014-2025. The primary input into the drafting of the Policy was from the Ministry of Mining, committed to revitalising investment in the minerals sector. While the stabilisation strategy was distinct for each institution in the sense that unique mechanisms were introduced to address specific issues, the Policy's unifying logic hinged on the incorporation of resistant institutions into the extractive order through legal mechanisms and financial incentives. This incorporative intent was manifested by the introduction of private mining interests into the governance regime at both the central and sub-national levels of government (albeit in different ways) and the empowerment of the executive at the expense of representative institute at each level of government.

Blurring the Public-Private Divide at the National and Sub-National Levels

Making concerted and formalised efforts to consult stakeholders and rebuild relationships with investors was a key priority for the Ministry of Mining during the 2014 period of law and policy reform. As the Director of the Strategic Policy and Planning Department put it (author interview),

I'd especially like to note that during the legal reform at this time, we were paying special attention to having discussions with our key stakeholders because, to be honest, we have a bad history of changing laws frequently and suddenly... Because the market conditions suddenly changed and the prices went down, we had no choice but to support industry and businesses.

These efforts appear to have been well-received by representatives from the investment community. The President of the Mongolian National Mining Association corroborated the view of the Director quoted above, stating that ‘stakeholder consultation’ was a key aspect of the new state policy (author interview).

The intention to restore a confident and collaborative working relationship between the government and investors had both an international and a domestic aspect. Internationally, it involved Mongolia being ‘very active in terms of foreign relations with our neighbouring countries and other economic partners’ (Director, Strategic Policy and Planning Department, Ministry of Mining, author interview). In particular, with China, Mongolia has sought ‘a very intense and close relationship’ since 2014, with currency swaps and the signing of long-term purchase agreements for mineral commodities (i.e., coal). In early 2015, Mongolia signed an Economic Partnership Agreement with Japan and by the end of the year was prepared to sign a Foreign Investment Protection Agreement with Canada. The Director described ‘competitive proposals’ for financing projects from Germany, Japan and the UK, as well as monthly meetings with the UK and Australian embassies ‘exchanging information and discussing about the ways in which we can proceed and cooperate’ (ibid).

More remarkable, however, was the invitation to private stakeholders to participate in mining policy-making at the national level. In terms of stabilising the investment environment, the State Policy provided a policy and legal basis for establishing a multi-stakeholder Minerals Policy Council (MPC) under the supervision of the Ministry of Mining. A ‘balanced representation’ of government officials, investors, professional associations and civil society organisations were supposed to be included on the

MPC. According to a senior official in the Ministry of Mining (author interview),

The Minister of Mining is head of the Mineral Policy Council. One third is government officials related to mineral policy (Ministry of Mining, MRRM, Ministry of Environment, Ministry of Finance), one third is company representatives, big and small; and academicians, researchers, civil society.

The Director of the Mongolian National Mining Association holds the role of Vice Chairman, as the private sector counterpart to the Minister of Mining. The rationale of the council is to professionalise decision-making in the mining sector: 'the main purpose of this Mineral Policy Council is to discuss and assess new legal reform proposals as a professional body' and crucially to prevent legal reform: 'if there is no support from this policy council, no legal reforms can be made in the mineral sector' (Director, Strategic Policy and Planning Department, author interview). When asked what the principles will be used to evaluate whether support should be given for legal reform, the Director (ibid) explained that,

They must act in a professional manner, without politicising issues... The decisions that are made by them must be directed to support industry, because in Mongolia... Any Parliament member can propose, initiate legal reform. But before discussion at Parliament, that initiation must go through this Mineral Policy [Council] and if that proposal gets approval then Parliament will discuss. Without the Mineral Policy [Council's] revision and approval, [nothing] can go to Parliament.

A senior policy-maker who had played a central role in the drafting of the State Minerals Policy, similarly described the role

of the Minerals Policy Council as preventing ‘election populism’ (author interview):

We created a special council – policy council – consisting of different stakeholders... The policy council should review any suggested laws. So if they say no, it will be very hard [to get them passed]. In that way, we want to neutralise some election effects.

The Minerals Policy Council thus provides a legislated space for investor representation in government decision-making, in addition to creating a systemic pathway for investors to lobby the government through the Ministry of Mining through the inclusion of private stakeholders on the council. Prior to the 2014 commitment to the ‘consultation of stakeholders,’ the state’s engagement with the private sector had been ad-hoc and dependent upon the initiator of the law (President of the National Mongolian Mining Association, author interview).

In the sub-national context, a similar story unfolded. The new State Policy also introduced Local Development Agreements (LDAs) within the broader goal of ‘supporting local development and protecting local community interests’ (Article 3.5). While the phrasing of the article goal suggests that the emphasis was on the “community,” I argue that LDAs were clearly intended by central policy-makers to function as another institutional mechanism to create a predictable investment environment. A senior policy-maker in the Ministry of Mining (author interview) stated that the

government want[s] to create and approve a long-term model... so the government can say [to local governors] “you [only] have the right to request certain things within a certain framework.”

In November 2014, the author attended a national policy workshop on LDAs sponsored by the Ministry of Mining, MRAM and the World Bank. It was attended by approximately one hundred representatives from major mining companies such as Rio Tinto and Anglo-American, local governments from around the country, the newly formed Anti-Corruption Agency, the Ministry of Mining, MRAM, Hogan Lovells, and a few private social consultancy organisations. The then Director of the Department of Strategic Policy and Planning at the Ministry of Mining stated in his introductory presentation that, 'our country has become a mining country,' adding that 'without mining, many countries couldn't have developed' referring to Japan, Russia, Germany and England as examples. He emphasised that the Mongolian government needed to expand and enhance the scope of national geological surveying, and that the public and private sectors needed to work together more because the private sector was apparently bearing the majority of risk for mining projects. In his view, the central government needed to oversee local governments' engagement with corporate stakeholders as local governors and governments occasionally refused geological surveys to be carried out in their jurisdictions and politicised the oversight of the central government to gain election favour with their constituencies. As the then Deputy Minister of Mining, E. Oyun, stated in an interview with Worldfolio (2014),

There is a problem of miscommunication with local people, from the side of the government and from the side of the private industries... We want more involvement of local governments and we want them to use the mining revenues to benefit their local communities... This is a new approach that will help local people to see and feel the benefits of the mining industry... It is also good for miners, because [there] will be no anti-mining activities.

Local development agreements discipline local administrations by limiting the scope of their demands within a pro-extractive, pro-investor framework authorised by the Ministry of Mining. Sub-national administrations at the provincial, district and sub-district levels have been a source of frustration to both mining companies and the pro-extractive agenda advocated by the Ministry of Mining since its formation in 2012 under the Democratic Party-led coalition government. Rural citizens' frustration with the environmental impact of mining and a growing sense of discontent with the centralised distribution of mineral rents established in the 2006 Law had created a situation in which local administrations were often a primary opponent of mining. As the President of the Mongolian Investors Association (author interview) put it:

All of a sudden local people started opposing mining projects in their territory because... they don't benefit from mining. They [had] no benefits, no tax... everything [went] to the central government.

While *aimag* and *soum* governments' approval has been formally required for the approval of mining licenses by MRAM, it was their informal power to make financial demands on mining companies that led to significant exasperation on the part of investors. Thus, the investor-local government relationship had become a site of instability and political risk for investors, and tension between the central government and its sub-national administrations. LDAs as construed within the State Minerals Policy and formalised in the amended minerals law (2014) were intended to limit and manage public expectations of mining companies' contribution to local development projects by creating a centralised template of local contracts. Local contracts have been designed to limit the "infinite" demands that could be

made by local people and administrations, and to make decision-making more objective.

While a general legal obligation on companies to ‘cooperate’ with local authorities in relation to local development priorities has existed since 1997, the nature of that obligation has shifted from an ad-hoc ‘consult and coordinate’ model (Article 33.1/1997 Minerals Law), to multiple agreements on specific issues (Article 42.1/2006 Minerals Law) to a single agreement (Amended Article 42.1/2014 Minerals Law). The 1997 ‘consult and coordinate’ model placed local governments at the centre of local development, with extensive leeway to negotiate without oversight from the central government. The 2006 amendment limited the scope of local governments’ demands on mining companies to a narrower range of ‘specific issues,’ although there was still space for a mining impacted region to require agreements at different levels of local government depending on the scale of the project. The 2014 amendment, however, limits the scope of local governments’ leverage over the social contribution of mining companies by requiring a *single* agreement. It mandates companies to sign a single agreement with local authorities only on ‘matters of environmental protection, infrastructure and job creation, *voluntarily* supporting local community development’ (Article 42.1, emphasis added), legally placing the corporate partner to the agreement in the stronger bargaining position.

The Ministry of Mining, in conjunction with the World Bank, initiated the development of a template for LDAs in 2014, along with model investment agreements, as the negotiation of both of these types of agreements have been fraught by conflict and generative of the kind of political instability so unattractive to investors. These models provide authorities and companies with

clear formulae for contract negotiation.⁵³ The template of the Model Community Development Agreement (English translation, official draft) establishes firm parameters for the terms and manner of negotiation between local authorities and mining companies, requiring a separate public-private institution to govern the agreement – the “Relationship Committee” – which exists outside the municipal structure of local administrations. The Relationship Committee is supposed to be comprised of an executive representative of local government (the Governor) and representation from the mining company, with civil associations invited as observers to the agreement (ibid). Structurally, it is a hybridised agreement, as opposed to a clear public-private arrangement, because it incorporates the public and private sector into a structure that is decidedly public in its ramifications and yet private in process, with agreement-specific financial and dispute resolution mechanisms. Thus, despite their “community” rhetoric and its “public” connotations, LDAs model private contracts that tightly link the executive arm of local governments with that of the mining company.

Within the framework of the agreement, LDA-specific financial and dispute resolution mechanisms are meant to be developed on a case-by-case base, with the basic guidance being that both are “independent.” This means that they are effectively insulated from public legal and political power. In financial terms, LDAs are like private development funds, accessible only through the LDA governance structure. While the template allows for different forms of legal review (independent mediation, private arbitration, court settlements), private investors are unlikely to opt for the national court system given the choice. The LDA template model is very long and detailed, resembling a complex contract. The

⁵³ The models were developed by Hogan Lovells, the global legal firm which won the bid from the World Bank.

complexity of agreements tends to indicate a lack of trust and an effort to protect company interests by covering all potential loopholes. In light of their structure and the intentions behind their creation in the Ministry of Mining, LDAs are evidently designed to protect company interests and facilitate extraction, rather than encourage a meaningful political process about mining in rural areas.

In terms of the central state's interest in LDAs, the rationale was clear. The Director of Strategic Policy and Planning at the Ministry of Mining explained to me in an interview that LDAs are essentially "fences" to limit local demands on mining companies:

There were some cases where local governments demanded too much from companies. So, the Cabinet decided that we're going to approve the model contracts of those rural developments, community developments... And [through] that example agreement we are going to make fences, limitations for local governments... Because the previous one was not officially approved by anyone, local governments could follow it, they could not follow. So the law last year we intentionally included regulation that the model contracts will be approved by Cabinet, local governments should follow that.

The Director later emphasised at the National Corporate Social Responsibility (CSR) Forum in Ulaanbaatar (author observation) that as the law develops in mining sector, so do the types of contracts available, portraying LDAs as a progressive legal development. In his view, LDAs were part of a legal framework to prevent change in mining policy, by creating clear timelines for decision-making and limited options for local governments and citizens. In another interview, in response to a question about the

purpose of LDAs, a senior policy-maker said that their purpose was to create clarity around the terms and conditions of 'social investments' from mining companies:

It's very hard to distinguish [between] the social license to operate or [if] it's bribery. So we want to make it official. There should be a draft or model agreement, and they can just change the names, locations, maybe size of money or something like this.

This statement was in the context of a discussion about mining companies' frustration with local governments, the emphasis being on the corrupt demands of provincial and district authorities. In a very real sense, LDA's are engaged in political 'boundary work' (Li, 2007: 214), as institutional forms that serve 'the careful management of unruly or disruptive social forces, and the containment of political challenge (ibid).

The introduction of LDAs dovetailed with recent changes to the revenue redistribution structure. The 2011 Integrated Budget Law introduced the possibility of a more decentralised model of financial redistribution from the state budget to local administrations to take account of the growing sense of discontent around the terms of subnational 'revenue sovereignty' in the context of 'rapid economic growth' (ibid: 26), driven largely by the mining sector in rural areas. Article 59.4 of the 2011 Integrated Budget Law consequently stipulated that Local Development Funds in mining regions would be allocated up to ten percent more of the mineral royalties from the central General Local Development Fund than non-mining regions (ibid: 18). The 2011 Budget Law, however, still maintained a significant degree of central control over the redistribution of mining license fees and royalties. In response to the fact that 'the local government and local citizens don't like to support mining or

geological activities' (Officer, MRAM, author interview), a further incentive of direct revenue sharing of royalties and mining license fees was introduced in the 2014-2015 mineral sector reform. As of January 2016, 50% of mining license fees were allocated to *aimag* branches of local government in mining regions (with 25% going to *soum* branches). Formerly, only 5% of mining royalties would be redistributed to local governments through the Local Development Fund (LDF). While that 5% distributed through the LDF is maintained, additionally provincial governments in mining regions can expect to receive 20% of royalties and district governments to receive 10% through direct transfer.

In conjunction with the introduction of LDAs, the financial incentives for local governments to approve mining licenses and work closely with mining companies increased monumentally. Both LDAs and direct revenue sharing mechanisms were portrayed by central state proponents (i.e., Ministry of Mining and MRAM) as positive shifts towards decentralised and participatory governance, where local governments have a greater sense of administrative control around both their budget and local spending priorities. However, as the interviews indicated, these "decentralised" legal mechanisms have been strategically deployed by pro-extractive institutions in the central state to curtail resistance to mining and get local governments "on board" with extractive development. Without evidence of "political" coercion, the central government has effectively eliminated cause for resistance by creating incentives for local elites (particularly governors) to support mining companies. This perspective was reinforced by the author's interviews with personnel from local administrations in mining-intensive regions. According to the Director of Development Policy Department in Selenge *aimag*, 80% of the *aimag's* income was derived from taxes from the mining sector (author interview). A *soum* governor from

Bayankhongor *aimag* (author interview) emphasised the pressure and difficulty he was under to balance local citizens' interests with those of miners, because of the link between supporting mining and receiving development funding from the central government.

Deepening Executive Power in the Central and Sub-National Branches of Government

Alongside the strategic insertion of private interests into national and sub-national mining governance, decision-making authority was also relocated and reinforced in the executive spaces of the state since the 2012-2013 “crisis” in FDI. At the sub-national level, following on from the previous discussion, local development agreements have the effect of strengthening executive power, as well as introducing private extractive interests into the fabric of local development planning and policy. Governors were designated as the “representative” signing party on behalf of local communities, even though they are the least representative office in democratic terms. The incorporation of the executive arm of local governments into the LDA to the exclusion of other bodies like local parliaments insulates mining companies from more “demanding” parties; the structure of the agreements creates a strong incentive for governors to support the agreement. In response to the question “Is it better to work with the Governor or the local Parliament Chairman in relation to LDAs?”, the CEO of a Mongolian mining company (author interview, November 2015) responded:

The Governor. It's one person. The Chairman, with his cabinet, there are ten people, twelve people... but with just one governor, it's one person, so what the hell, right?

LDAs also structurally encourage vertical stability for mining projects by incorporating governors as the co-signatory, because the appointment of governors is the prerogative of the governor of the higher level. A provincial governor is unlikely to approve a governor that would challenge the terms of the LDA that he or she signed, which would interrupt the flow of funding into the local budget. In this way, LDAs are likely to shift the balance towards state-management at the expense of self-government by incentivising the approval of pro-mining governors in sub-national administrations.

The centralising effect of LDAs is belied by their “decentralising” purpose as articulated in national policy, to provide a stronger institutional mechanism for local community engagement and direct distribution of social investment by companies. The central state appears to be absent from direct oversight of the process of LDA negotiation, apart from setting out a standardised template in accordance with the minerals legislation. However, the power of the central government is expressed through the force of law (i.e., the legislated, compulsory nature of LDAs) and the financial incentives that they offer to the impoverished coffers of local administrations. LDAs do open up space for local administration-company negotiation of direct community benefits, but within a tightened space of self-governing autonomy. For example, while MRAM still requires local authorities’ approval before issuing a mining license, the basis for a legitimate refusal has been restricted. As the Director of Strategic Policy and Planning at the Ministry of Mining (author interview) explained,

Before issuing a license, MRAM sends a letter to the local government to hear their opinion and local governments can agree or they can disagree. But in the case of disagreeing, they must provide legitimate

foundations. Reasoning. ... If they have any plans to protect an area for local protection, they must make a decision at the start not afterwards.

The raised bar of legitimacy for refusing of mining licenses directly corresponds with the contentious history of local authorities strategically setting aside land for ‘special needs’ to legally block mining projects in their territories since the early 2000s (Endicott, 2012). This new standard operates in conjunction with the predetermination of land for extractive development by the Ministry of Mining. The Ministry has designated 30% of national territory for exploration and mining licenses. This centralised determination of land was part of the 2014 reforms to the minerals law and policy (see Table Two). While the land designated for extractive development was not supposed to ‘overlap with any environmental, cultural, historical things that need to be protected’ (Director, Strategic Policy and Planning Department, Ministry of Mining, author interview), mining-critical activists have contested this determination of land, e.g. the Centerra Gold Gatsuurt Project (Satke, 2015).

The institutional infrastructure for mining within the Mongolian state expanded significantly after the investment crisis, strengthening and reinforcing a pro-extractive executive block in the state. Initially, in 1997, the Mineral Resources Authority of Mongolia (MRAM) was established as an ‘autonomous lead agency... to facilitate the implementation of the new minerals law’ (World Bank, 2006: 3). MRAM was given a large significant amount of implementation power and discretionary oversight of the minerals industry, particularly in light of MRAM’s authority to assign ‘extensive exploration rights’ (ibid) through its Cadastre Division. The general structure of MRAM has remained fairly constant since 1997, but the broader institutional context in which it is located has shifted markedly.

Before 2008, MRAM operated with a substantial degree of autonomy as a 'quasi-independent agency, the acts of which did not require ministerial approval' (International Business Publications, 2013: 129). However, in 2008, MRAM was institutionally relocated under the 'direct authority of the Ministry of Mineral Resources and Energy' (ibid), now the Ministry of Mining. In the context of the 2006 amendments to the Minerals Law, this restructuring was seen as contributing a certain level of instability for investors' rights, as MRAM was under the discretionary oversight of a central government ministry and some of its prerogatives regarding licensing procedures for 'strategic deposits' had been transferred to the ministry (ibid). In the context of the 2014 amendments to the Minerals Law, MRAM's prerogatives have largely been returned to the original 1997 model, but MRAM has remained under the supervision of the Ministry of Mining.

The new consensus on promoting FDI in the mining sector means that the significant implementation and administration powers of MRAM are now concentrated within a very pro-investment government ministry. Not only is MRAM the formal source of economic and environmental information about the mining industry in Mongolia, but MRAM's Cadastre Division has the sole power to a.) 'receive, register and make decisions with respect to applications for licenses', b.) 'collect service and license fees,' c.) 'resolve boundary disputes between license-holders,' and, critically, d.) 'provide the public with access to the processes of issuing and reissuing licenses...' (MRAM, 2017) While MRAM officials emphasised in interviews that it is simply an 'implementation agency' (Officer, MRAM, author interview) it has sole decision-making authority regarding licensing, a monopoly on information about the mining sector, and is responsible for the overall economic sustainability of the mining sector (Head of

Mining Division, MRAM, author interview; Officer, MRAM, author interview). The empowerment of MRAM within the Ministry of Mining concentrates the state's administrative and executive power to support foreign investment in the mining sector.

This is particularly significant in light of the way that the Ministry of Mining has gained a position of institutional prominence in relation to the executive “core” of the state. The Ministry of Mining is a line ministry of the Ministry of Finance, which is one of four core executive ministries, along with the Ministry of Justice, the Ministry for Environment and Green Development, and the Ministry of Foreign Affairs. As a product of the deepening relationship between the Ministry of Mining and the Ministry of Finance, the Ministry of Mining has also developed a very close relationship with the Central Bank by extension. This pro-extractive formation linking the Ministry of Mining with the Ministry of Finance and the Central Bank helps to explain the new dominance of economic pragmatism in mining policy. As the Director of Strategic Policy and Planning put it (ibid),

The Minister of Mining is now solely responsible for the development of minerals sector, and we have two agencies underneath of us – the Mineral Resources Authority of Mongolia (MRAM) and Petroleum Authority of Mongolia (PAM). Mongolian legislation requires involvement of Parliament at some levels, but we have a close relationship, basically, with Parliament because Parliament approved the State Policy on Minerals Sector. They were very cooperative in making those legal reforms last year [2014]. Of course, Parliament is a political institution and there are many ongoing debates, but generally we have basic consensus. We work very closed with the Ministry of Finance and especially with the Fiscal Revenue

Division, our key counterpart. Previously, the two ministries didn't have unified database, and numbers differed a lot - projections, forecasts, everything differed. Now we have regular meetings with them, and the numbers are now the same.

Furthermore, the elevation of the Invest Mongolia Agency from its former position in the Ministry of Economic Development (now dissolved) to being supervised directly by the Prime Minister's office as of 2014 exemplifies the government's priority to encourage and protect investment through institutional reorganisation.

The close relationship between the financial, investment and extractive ministries has been known to generate conflict with ministries with other goals, such as the Ministry for Environment and Green Development. However, while the purposes of the ministries differ – 'we want to dig, they want to protect' (ibid) – a sense of pragmatism and the necessity of cooperation following the economic crisis of 2013 helped to stabilise underlying conflicts. This was evidenced in the revisions made to the Law on the Prohibition of Mineral Exploration and Mining Operations at Headwaters of Rivers, Protected Zones of Water Reservoirs and Forested Areas (hereafter 'the Law'), which had led to the cancellation of licenses for over two hundred mining projects in 2011 (see Chapter Three, section "2009-2013: Optimism and Entanglement"). This law, pejoratively referred to as "Law with a Long Name," was widely perceived by mining companies and government officials as a 'half-baked' (Environmental Adviser, Sustainability East Asia LLC, author interview) law that was completely unrealistic. The lack of clear regulations for the implementation of the law seemed to give local governments and the Ministry of Environment and Green Development (through a working group) too much discretion in the determination of

environmental boundaries, according to multiple sources. Consequently, since 2014, the Ministry of Mining worked closely with the Ministry of Environment and Green Development to reduce 'discrepancies' in decision-making and to think more realistically about 'compensation and those types of financial issues' (Director, Strategic Policy and Planning Department, Ministry of Mining, author interview).

An important aspect of the pro-extractive consensus has been the effort to consolidate and centralise national geological information under the auspices of the Ministry of Mining and MRAM through the establishment of a National Geological Survey and designated Office, explicitly mandated by the 2014 amendments to the Minerals Law. In the early 1990s, the socialist-era geological offices and laboratories were privatised along with many other SOEs. Consequently, the state as a whole lost a significant degree of control over national geological information. The discovery of Oyu Tolgoi, for example, was based on minerals mapping from the 1980s accessed by BHP Billiton in the early 1990s following the privatisation process. National geological information continues to be predominantly based upon socialist-era surveys from the 1970s and 1980s, conducted largely through joint-ventures with Moscow. In the late 1990s and early 2000s, private companies acquired new geological data through exploration activities, which the government has the right to receive upon request (Senior Policy-Maker, Ministry of Mining, author interview). Consequently, the current scope of national geological data is an assortment of rudimentary surveying from the socialist era and exploratory mapping of specific areas by private companies.

Since 2014, consolidating and improving the quality of available geological information has been considered a top policy priority

by senior officials in the Ministry of Mining. In 2014, the then-director of the Strategic Policy and Planning Department argued that more consistency was needed, as many mining companies had complained that local governments gave them conflicting geological information (Multi-Stakeholder Workshop on Community Development Agreements, author observation). This appears to be partly motivated by a desire to strengthen state control of the mining sector but also to attract investment, indicating a harmony of interests between the public and the private sector as the state seeks to enable extraction. As one senior policy-maker (Ministry of Mining, author interview) put it,

In order to develop or attract foreign or large investments in the mining sector, one of the important things is to manage the exploration and regional geology. The mining companies are coming into the country... based on the information, they have a decision whether to make investment, to do the activity. So one of the most important [items of] information is geological baseline information, [to indicate] the potential of the country where you want to invest... Another thing is, of course, the legal framework: how stable, or how easy to get into. The Mongolian government has decided that attracting foreign investment is important, so therefore we need to promote our potential, our advantages. Therefore, the government has started to issue new exploration licenses [because] the amendment to the Minerals Law (2014) allows us to grant new exploration licenses.

As of 2015, senior policy-makers in the Ministry of Mining favoured a 100% state-owned National Geological Office where the results from the recently initiated regional survey can be processed, particularly those which have been ‘accumulated in different formats and different times’ to be ‘delivered to different

stakeholders' (Senior Policy-Maker, Ministry of Mining, author interview). Private stakeholders, however, apparently favour a public-private partnership model for the National Geological Office, similar to the Construction Office, to prevent total state control of strategic geological data.

Conclusion

Following the 2014 reforms, a demonstrable shift occurred within the architecture of the state in relation to the mining sector that insulates investment interests from “political risk” at both the local and central levels of government. On one hand, at both the central and local levels, there was a simultaneous insertion of private actors and direct representation of their interests within the structure of state governance of the mining sector through the Minerals Policy Council in the Ministry of Mining and LDAs in sub-national administrations. These mechanisms represent a *formalised* rupture in the fabric of government, by legitimising the role of private actors, interests and norms within national public governance. While this shift towards hybridised governance reflected the lobbying efforts of investors and their private sector groups such as the Mongolian National Mining Association and the Business Council of Mongolia, it also reflects the trajectory of executive strategizing within the state. Even at the “local” level, it is the centrally-appointed governor that has been elevated as the key actor to negotiate with mining companies. Despite the decentred appearance of LDAs, for example, these “local” public-private “partnerships” are centrally mandated, enforced and structured. Thus, in addition to hybridisation, I have focused on the deepening cooperation and expansion of pro-extractive institutions in the executive arm of the state itself which have significantly increased in terms of scale, degree of ideological consensus and scope of decision-making power.

In this chapter, I have linked the various and innovative means by which “political” actors within the state have been undermined through the pro-extractive, anti-politics of “stability” following the 2014 recommitment to promoting FDI in Mongolia’s mineral sector. The process of undermining resistance and redistributing power within the state occurred in different forms, through the introduction of strategic public-private partnerships (i.e., Local Development Agreements), the softening of institutional boundaries between the state and corporate representation, and changes to national law and policy (i.e., 2014 reform to the Minerals Law and new State Policy on the Minerals Sector 2014-2025). Although targeting disparate loci of resistance within the central state and between local and central governments, these processes are unified by the way that they smooth and stabilise the path for extraction. Within the state itself, private investment interests have become intertwined with strategic institutions of governmental authority, such as the Ministry of Mining and the offices of provincial and district governors. One way in which this has occurred is through the formation of hybridised institutions such as the Minerals Policy Council and Local Development Agreements that exist within the municipal structure (i.e., they directly affect public governance) but are structured on the basis of private interests and forms of law (i.e., multi-stakeholder, contractual models). Almost simultaneously, private interests were included within the space of government and representative “political” institutions were marginalised, demonstrating the state’s renewed commitment – vis-à-vis executive institutions – to enable FDI.

Notably, these dexterous methods of stabilising the investment environment as implemented by the pro-extractive executive are “non-political” in form, despite their significant impact in structuring the plane of political legitimacy. By non-political, I

mean that these executive actors and institutions were deploying legal and financial measures rather than relying on overtly coercive means to achieve the goal of ensuring stability for investors. For example, by restructuring the redistribution of mining taxes, fees and royalties and making LDAs a *legal* obligation for local governments and mining companies, the strategic hand of the central state in facilitating financial dependency upon mining in rural areas was conveniently veiled. A complex arrangement of legal and financial incentives, buoyed by strong narratives of anti-corruption and anti-nationalism, gave the post-2014 pro-investment trajectory a “common sense” appearance. It became increasingly difficult for an alternative paradigm of economic development to be articulated by national actors and institutions.

Chapter Five

New Boundaries of Inclusion and Exclusion: Governance Participation and the New “Social” Stakeholders of Mongolia’s Extractive Economy

Introduction

In the previous chapter, I focused upon the effect of the post-2014 stability consensus on the state itself, and the way that protecting investors from political risk has reordered the balance of norms and power within central government institutions, and between central government and sub-national administrations. Overall, I argued that “political” norms and institutions have been sidelined by the preference for economic rationality and executive power within the mining regime. This chapter transitions from this focus on the reorganisation of power *within* state institutions in relation to Mongolia’s extractive economy, to some of the effects of this reordering process on state-society relations.

Transformations in law or state institutions necessarily affect the context in which people relate to legal and political authority, and to each other, as subjects of that order. In the process of ‘conditioning local political economies and societies,’ (Cutler, 2011: 30) transnational legal ordering can produce new ‘subjects and objects of legality, localised and delocalised social relations, territorialised and deterritorialised systems of rule, and hard and soft forms of regulation’ (ibid: 31-32). Thus, drawing on Cutler (ibid: 30), I argue that legal and institutional reordering to enable global economic integration inevitably ‘defines and regulates the terms of political engagement and contestation,’ as transnational forces ‘penetrate domestic politico-legal orders.’

In this thesis, I have already examined in some detail the way that the state-economy relationship in Mongolia has developed and changed over time, from the pre-socialist period up through the current period of global economic integration. Now I will turn to some of the effects of the current reordering on the relationship between the state and civil society. In the Mongolian case, the institutional sphere of civil society, formally distinct from the state and commerce, is a relatively new phenomenon. The protection of civic space from state interference was introduced through the political and economic liberalisation process in the early 1990s (Mendee, 2012; Fritz, 2002, 2008) and has appeared to flourish, indicated by the subsequent emergence of a plethora of NGOs (Byambajav, 2006). I take as my point of departure the institutionalised understanding of civil society as expressed in Mongolian law (and society), which differentiates it as a space of rights and responsibilities along classical liberal lines from the political (state) and economic (commercial) realms, although I hope to demonstrate that these clear conceptual lines between political, economic and social are highly problematic in practice. In this chapter, for instance, I examine the ways that civil society organisations have been disciplined by, as well as internalised, the post-2014 “stability consensus,” and highlight the way that corporate/financial institutions exercise an unprecedented degree of authority as “social” actors in fundamentally political processes of conflict resolution at the sub-national level.

This chapter is an exploration of new boundaries around what potentially may or may not be legitimately contested by civil associations and citizens under the post-2014 order. The nascent nature of this transformation prevents hard and fast conclusions, but three distinct shifts are notable. Firstly, strong boundaries have been placed by the state on organised civic resistance to foreign investment and widespread extraction through the

criminalisation of “radical” environmental movements. Since 2013, the path of legitimate engagement for civil society organisations has been limited to cooperative participation in governance, incorporated into multi-stakeholder mechanisms of consensus-building, alongside the state and the corporate sector. Secondly, corporate actors and IFIs have become powerful authorities in relation to the “social” governance of extractive development, demonstrated by the growth of corporate-led programmes to address disputes between companies and the local “community.” This development has been facilitated partly by local government-company collaboration in the framework of Local Development Agreements, and also through new strategies deployed by NGOs using non-state mechanisms to gain recognition (i.e., vis-à-vis the International Finance Corporation Performance Standards). Thirdly, and relatedly, the “social” governance of extractive development can be characterised by the rising dominance of corporate legal norms of recognition (i.e., stake-holding) and justice (i.e., balancing private interests). Together, all three of these factors work to generate consensus-driven, corporate-dominant power relationships and establish new “rules of the game” for civic engagement with the state outside the purview of the national constitution. Ultimately, neutralised civil associations and the power of corporate actors and norms in the governance of citizenship enable extractive development by minimising the effects of resistance to it and managing dissent in more “constructive” directions through consensus-based mechanisms, sanctioned and sponsored by the state, the mining sector and its international financiers. This process of neutralisation and dissent management under the aegis of “multi-stakeholder solutions” was a critical piece of the post-2014 “stability consensus” that discursively and

institutionally erected and reinforced the ‘limits of the possible’⁵⁴ (Cox, 2002: 37) in Mongolian law and politics.

Organised Civil Society in Mongolia: An Overview

The 1992 Constitution expressly recognised the illegitimacy of state repression of collective organisation, guaranteeing the ‘right to form a party or other public organisations and unite voluntarily in associations according to social and personal interests and opinion’ (Article 16.10). A series of new laws after 1992 guaranteed not only the protection of civic space but recognised civil society organisations – NGOs specifically – as a legitimate partner for the state in creating and implementing legislation, notably in relation to environmental protection (Danaasuren, 2010: 9). Specifically, the 1997 Law on NGOs (hereafter “the Law”) authorised legal space for civil society organisations to gain formal recognition as registered non-governmental organisations, recognising both Public Benefit Associations and Mutual Benefit Associations (Articles 4.2 and 4.3). The 1997 Law defined non-governmental organisations broadly as:

An organisation which is independent from the state, self-governing, not-for-profit and established voluntarily by citizens or by legal persons other than State bodies (that exercise legislative, executive or judicial powers) on the basis of their individual or social interests and opinions. (Article 4.1)

The Law still made provision, however, for the state to contribute ‘financially and otherwise’ (Article 9.3) to the activities of NGOs. The majority of NGOs emerged following the passing of the Law, with 5,077 NGOs registered by September 2005 following a

⁵⁴ That is, ‘the strong bonds that hold the existing order together, and the influences that orient its direction of development’ (Cox, 2002: 37).

national survey commissioned by the Open Society Forum (Gombodorj and Batsuren, 2005: 3). Approximately 77% of NGOs in 2005 were based in Ulaanbaatar (ibid). In 2008, Mongolia's Civil Society Council was established with four sub-councils, covering 1.) Environment, 2.) Education, Culture and Science, 3.) Health, and 4.) Defence (UNDP, 2012). Based on national statistics, the number of NGOs registered in Mongolia has always been remarkably high relative to the population (2.8 million), growing approximately ten-fold between 1997 and 2007 (Mendee, 2012: 19). However, as Mendee (ibid: 20) points out, these numbers may be misleading. Since 2005, there has been a lack of national data on the composition of civil society, and the number of registered NGOs is likely to be significantly higher than those that are truly active (ibid). Furthermore, the Civil Society Council and its sub-councils suffer from a lack of visibility and coherence in relation to 'representative, networking and coordination functions... due to lack of capacity in terms of financial and human resources' (UNDP, 2012: 7).

The limited levels of funding available from the state and the general lack of a culture of organised philanthropy in Mongolian society (Daanasuren, 2012) have given international NGOs and foundations with greater financial backing a high degree of influence within civil society in terms of shaping its norms and organisational mode (Byambajav, 2006). Consequently, Mongolian civil society, particularly in Ulaanbaatar, has tended to reproduce the coherent 'structural pattern of international NGO networks' (Katz and Anheier, 2006: 241) in form and activity (including the hierarchical relationships between international-national-local scales, urban and rural areas). For example, Mongolian NGOs typically have membership links to international NGOs and networks, attend conferences, produce reports, depend on diverse avenues of donor funding (i.e., through transnational

organisational memberships, public sector grants and/or corporate contracts), and intervene in society via short-term projects that aim at policy and legal reform or “capacity building” among their target groups (ibid). The transnational NGO network in which Mongolian civil society largely participates is dominated by a specific discourse buoyed by the terms ‘participation, empowerment, local, and community’ (Fisher, 1997: 442) which connote an organic notion of the “social” without the sinister taint of ‘profit or politics’ (ibid).

International NGOs were the first on the scene, so to speak, following Mongolia’s impoverishment as a result of the collapse of the Soviet Union and the marketization of the country’s economy (Byambajav, 2006; Rossabi, 2005). Not only this but organisations like the Soros Foundation, the Asia Foundation, World Vision, the Konrad-Adenauer Foundation, to name a few, occupy the unique position of being both directly engaged in civic activities *and* a primary source of funding for domestic civil society organisations. Thus, significant inequalities in power exist between organisations within civil society, with a relatively few number of organisations having privileged access to long-term funding. The concentration of financial resources in Ulaanbaatar-based, foreign-funded civil society organisations creates a serious power disparity, with a few entrenched organisations at the top and a mass of short-term, small-scale associations competing for funding and support. Significantly for this analysis, international NGOs tend to support extractive development (i.e., mining) on the whole, with the caveat that it is carried out in a responsible manner.⁵⁵ Despite the presence of a “real” space for civil society there is a danger of being overly positive about this development

⁵⁵ For example, the Asia Foundation promotes “responsible mining” in line with global good governance standards, as will be discussed in relation to its Responsible Mining Initiative and Engaging Stakeholders in Environmental Conservation Projects.

in terms of its actual impacts. “Social” actors such as NGOs may very well reinforce and legitimise the dominant pro-mining consensus as they are incorporated into the governing order for extractive development, as will be demonstrated in the following analysis.

The Law and Politics of Exclusion in the Making of a “Civil” Society: Limiting Investor Risk from Environmental Activists

In this section I argue that relations outside of the state – state-society relations – have been stabilised to exclude more radical expressions of resistance from the Mongolian public. Despite constitutional guarantees preventing state repression of collective organisation and freedom of expression, the government has established new boundaries of legitimacy for those social movements that are resistant to foreign investors and widespread extraction, notably since the crisis of foreign investment in 2012-2013. These boundaries have been established through positive measures – financial and political incentives – but are backed by the threat of criminalisation, as the case of the Fire Nation movement demonstrates. This section will briefly provide the legal and political context for the development of organised social action and agitation around mining by resistant groups, and the ways in which the most radical elements have been excluded and “stabilised” for the purposes of diminishing risk for investors and mining companies.

Civil Society Organisations in Mongolia and the Emergence of Environmental Activism around Mining

1997 was a momentous year for Mongolia in terms of legal change. It could be termed “the Year of Liberalisation” with the passing of the 1997 Minerals Law *and* the Law on NGOs, which

respectively opened up the Mongolian minerals market to investment of unprecedented scale and further legitimised voluntary associations through legislation. Prior to the advent of the mining boom at the end of the 1990s, the majority of civil society activism was based in Ulaanbaatar. The majority of organisations were either international NGOs responding to the political opportunity for promoting democracy (e.g., the Konrad-Adenauer Foundation and the Asia Foundation) and the social needs created through the transition process (e.g., World Vision, Save the Children), or Western-style NGOs 'established and led by women' (Byambajav, 2013) in Ulaanbaatar.

In contrast to Ulaanbaatar's centralised NGO-model of civil society organisation, the mining boom catalysed a unique mobilisation of activism (Byambajav, 2014:2), with collective action emerging from rural areas across the country where the impacts of mining and large-scale licensing had been felt most keenly. The input requirements of mining in terms of land and water not only created an economic conflict of interest with herders, but destabilised their entire social environment (Byambajav, 2012: 13). Suffering from the pollution and drying up of rivers, displacement from precious cultural and spiritual landmarks, and customary grazing land, small groups began to organise themselves to resist these changes in the early 2000s. These movements expressed resistance in various ways initially, through short-term direct action protests, such as roadblocks, hunger strikes, and lobbying within the Citizens Councils of local government (Byambajav, 2012, 2014; Upton, 2012). Their discourse was explicitly political, drawing on Mongolian nationalist associations with the *local homeland (nutag)* and rivers – "the people of the one-river" (Byambajav, 2014: 1; Sneath, 2010: 253). The idea of Mongolia as a 'motherland... in

which people have their roots' has been described by Sneath (ibid) as a 'core value in the national political culture.'

Initially at least, the success of rural resistance was dependent on the political support of local authorities and the financial assistance of international NGOs, specifically the Konrad-Adenauer Foundation which supported the first sustained environmental social movement in response to mining in 2002: the Onggi River Movement. In relation to local political backing, the consolidation of collective action to resist mining reflected the support of local institutions for the resistance movement. Byambajav (2012: 21), for example, credits local "elites" and government officials for consolidating the efforts of local citizens in Tsenher *soum* (Arkhangai *aimag*, central Mongolia) into an organised resistance *movement* known as Aruin Suvraga (Sacred Suvraga Mountain). While senior citizens, teachers and a few other motivated citizens had attempted to gain central government attention and catalyse a systematic campaign against the mining company Mongol Gazar ("Mongolian Place") (ibid), they were unsuccessful. It took the involvement of senior representatives from Tsenher *soum*'s Local Homeland Council and local governmental officials (notably the governor and environmental inspectors) to consolidate collective action strategies (ibid: 22).

Similarly, in the case of the Onggi River Movement, the support of local authorities greatly aided the initial coalescence of the group as a fully-fledged – albeit small-scale – *movement*. In the author's interview with a *bagh* governor who became a leader within the movement, he stated that his rationale for getting involved with the Ongii River Movement was on behalf of the local community 'because the whole community was affected by the mining... by joining to the civil movements I can support the local community

and its environment.’ He attributed the success of the Onggi River Movement in garnering popular support to the fact that the movement’s board was comprised of representatives from each of the eight *soums* (districts) along the Onggi River, who reached out to citizens, mobilising them for direct actions and petitions (around 6000, sent to central parliament members). He described the support of *aimag* and *soum* government as “very good”, stating that some of the original members of the River Movement board were originally *soum* governors themselves. In the early years (2001-2005), apart from soliciting the interest of the Konrad-Adenauer Foundation to provide assistance with resources, the Onggi River Movement and smaller parallel movements maintained institutional distance from Ulaanbaatar-based NGOs. The River Movements were creative strategists, using a combination of informal and formal methods of protest. As Combellick-Bidney (2012: 287) puts it, ‘clashes between the River Movements and mining companies took the form of legal battles, rival stories in the media, and physical violence on the ground.’

In early 2006, a loose coalition of River Movements and other rural environmental NGOs was formed through a partnership with the Asia Foundation: The Homeland and Water Protection Coalition of River Movements (“River Coalition”). The Asia Foundation, as ‘the first non-profit organisation to be invited into Mongolia’ (Asia Foundation, 2016) in 1990, had become an entrenched civil society *institution* of sorts, with a “thick” development programme that ranged from direct service provision to public policy and governance support (ibid).⁵⁶ Its

⁵⁶ In Mongolia, specifically, its programmes range from helping ‘to strengthen anti-corruption efforts and improve administrative reform; improve governance of cities and citizen engagement; increase gender equality; advance responsible resource use and environmental conservation; and support Mongolia’s multilateral foreign policy engagement’ (Asia Foundation, 2016).

institutionalisation benefitted from its status as a regional NGO with sustained income from a variety of donors (i.e., foreign aid agencies, international financial institutions, corporations, and individuals). The recognition of growing environmental impacts and conflict caused by mining operations opened up *environmental governance* as a new field of engagement for the Asia Foundation.

Different accounts of how the partnership between the River Coalition and the Asia Foundation emerged emphasise varying levels of initiative by the parties. There was a sense, particularly among the leadership of the Onggi River Movement, that coordination was needed to effect national-level policy change. The Onggi River Movement contacted the Asia Foundation, to provide financial and coordination support in creating an umbrella organisation to link these grassroots environmental groups. Seeking support from the Asia Foundation was a strategic step for the River Coalition to sustain nation-wide collective action, widen their influence and develop a central hub to provide resources and administer localised activities. The Asia Foundation, however, was not a neutral actor in this process, but took an active role in selecting the members of the coalition and setting the tone for the mode of engagement that the coalition should seek.

The Coalition, aided by the Asia Foundation, ‘began exploring more cooperative, less confrontational approaches to dealing with mining-related issues’ (Asia Foundation, 2008), and developed seven principles to inform their legal advocacy:

1. Establish socially and environmentally responsible mining in Mongolia;

2. Require open public access to information related to mining;
3. Promote clear and transparent environmental impact assessment and decision-making on mineral development;
4. Ensure that mining operations meet best international standards for environmental practices;
5. Ensure that public monitoring and public audit compliance with environmental standards becomes normal practice;
6. Ensure that environmental laws and regulations are adhered to and enforced;
7. Ensure that Mongolia's protected areas remain free from environmental damage (Asia Foundation, 2006).

Notably, this consensus promoted a collaborative – rather than antagonistic – role for civil society in mining governance, focusing on transparency, inclusion and enforcement of the law. Previously, many of the River Movements had engaged in direct action protests and overtly political conflicts against mining companies, emphasising ‘the protection of the “local homeland” and its natural landscape’ (Byambajav, 2014: 2). The new agenda for the Coalition opened up opportunities for River Movements and other environmental NGOs to engage in legal advocacy and education-based campaigns, but increasingly delegitimised conflictual strategies. These values became the bedrock of the Responsible Mining Initiative (RMI), initiated by the Asia Foundation in 2006 following the formation of the River Coalition. A “grasstops” mechanism – ‘a framework for cooperative decision-making’ (Asia Foundation, 2008) – the RMI brought different stakeholders together with mutual interest in

“responsible mining.” As a multi-stakeholder NGO, the board of the RMI was composed of representatives from civil society, industry and government. Similar to the River Coalition, the RMI was founded on seven principles and values of “responsible mining” (ibid):

1. Ensure multi-stakeholder engagement
2. Transparency and openness
3. Responsibility for the safety of people and the environment
4. Investment in future development
5. Ensure fruitful productivity and efficiency
6. Humane and ethical
7. Based on advanced and modern technology

These seven principles assume that common ground could be found between different interest groups around the values of transparency, responsibility, growth, efficiency, humanity and technological progress. Furthermore, they gave inherent value to “multi-stakeholder engagement” and made shared responsibility a goal of the new multi-stakeholder collective, rather than targeting specific duty-bearers (i.e., the government). Leaders from the River Coalition were initially represented in the RMI, as were the Mongolian National Mining Association, Members of Parliament from opposing parties, the head of the trade union, and Oyu Tolgoi, among others. While on paper the RMI was remarkably impressive, allegedly “uniting” high-level stakeholders together around principles of responsible mining, its functionality as a decision-making forum was fraught with internal conflicts of interest between its members, notably between a faction of the River Movements and the Asia Foundation. Some of the River Movements perceived the Asia Foundation to be too heavy-handed in its facilitation of both the

River Coalition and the RMI (Daanasuren, 2012: 258) and the Asia Foundation found that some of its expectations for reciprocity were unmet (Consultant B, Social Development Specialist for the IFC, former Asia Foundation Consultant on the RMI, author interview).

While undoubtedly there were inter-personal tensions that contributed to inter-organisational conflict, the mismatch between an overtly politicised and confrontational approach as expressed by the Onggi River Movement and the consensus-driven ethos of the Asia Foundation became an insurmountable barrier to their continued cooperation. This conflict came to a head in 2008 when a group of the River Movements, led by the Onggi River Movement, publicly stated their 'willingness to organise violent protest, if necessary, against poor mining in local regions' (Daanasuren, 2012: 247). With the Asia Foundation unwilling to support this conflictual approach, the River Coalition splintered, with some movements following the Asia Foundation and others following the Onggi River Movement. The latter formed the United Movement for Mongolian Rivers and Lakes (UMMRL) in 2008. Despite the emergence of fragmentation between different approaches within mining-focused civil society organisations, the River Movements had the political support of large numbers of rural Mongolians, hundreds and even thousands of whom participated in direct action protests across the country (Combellick-Bidney, 2012: 287).

Overall, the first six years (2005-2011) of organised resistance to mining could be understood as a period of optimism for major transformation in the social and environmental regulation of mining.⁵⁷ The River Movements had developed from very small,

⁵⁷ Notably, this period of activist optimism was a critical factor in "destabilising" the investment environment because the state revised mining

grassroots organisations into a larger coalition based in Ulaanbaatar, with significant donor funding and opportunities to influence policy-making at the national level, not only through the RMI but also through the Mongolian Environmental Civil Council (MECC). Established in 2008, the MECC developed in response to the national groundswell of small-scale environmental movements pioneered mainly through the activism of Ts. Munkhbayar and the Onggi River Movement (MECC Director, author interview). The MECC is a national umbrella organisation that functions as a 'bridge' (ibid) between the government, NGOs and mining-impacted citizens. While the MECC does not now solely focus on mining, the public response to the impacts of mining in the early 2000s galvanised its formation as a civic institution. The MECC has since established administrative and regulatory requirements regarding registration, as well as financial reporting duties in order to manage the numerous environment NGOs (700+), the majority of which are comprised of five to ten people (ibid). The MECC has also opened up avenues for smaller NGOs to gain funding from the Ministry of Environment and other donor organisations, and achieve greater visibility for their work at the national level (ibid).

In addition to the MECC, the Law on Prohibiting Mineral Exploration and Extraction Near Water Sources, Protected Areas and Forests ("the Law") was passed by the Mongolian Parliament in 2009 following years of advocacy by the UMMRL and the support of a few law-makers. As mentioned in Chapters Three and Four, this piece of environmental legislation became a critical focus for environmental activism between 2009 and 2013. This Law prohibited 'mineral exploration and mining operations... at

and environmental legislation partly in response to its increasingly vocal public about the negative impacts and lack of benefits from mining (see Byambajav, 2014: 5-6). For more details of the 'destabilising' effects of legislative change between 2009 and 2013, see chapter 3 of this thesis.

headwaters of rivers, protected zones of water reservoirs and forested areas within the territory of Mongolia' (Article 4.1), although 'deposits of strategic importance' (Article 4.2) were excluded from this prohibition. Further, the Law gave the Government the right to delineate these boundaries, without specifying the precise limits or which branch of government had the right to do this (district, provincial or central). The lack of legal precision and openness to political discretion in the determination of environmental boundaries was the main point of contention for mining companies, as well as the requirement that licenses operating in these areas be cancelled (President of the Mongolian National Mining Association, author interview).

However, the government did not enforce the law, leading to renewed public demonstrations, hunger strikes and the filing of a court case against the Government of Mongolia in a district court in Ulaanbaatar by the UMMRL in 2010. The Law had been unenforced by the government because it would lead to the mass cancellation of mining licenses in areas newly protected under the law and grant local governments discretion in the determination of environmental boundaries. The district court ruled that the government was *not* responsible for the environmental damage caused by mining companies, leading to protests from the public led by the UMMRL. In April 2011, one hundred herders on horseback wearing traditional *deels* and armed with bows assembled in a grand symbolic protest in Sukhbaatar Square outside of the Great Khural. With them, hundreds of citizens gathered and called for a national referendum after collecting signatures, which led to the lodging of an appeal of the 2010 judgment in the Supreme Court. The 2010 district court judgment was overruled in October 2011, when the Supreme Court upheld that the government was responsible for environmental damages caused by mining operations, because it

had failed to enforce the new environmental law (Global Legal Monitor, 2011). Following the Supreme Court order, the enforcement of the law by the government led to the immediate suspension of over 200 mining licenses, affecting up to 1800 mining projects for extraction and exploration, provoking ‘intense opposition from miners’ (Mendee, 2013b).

In 2013, the radical decline of confidence in the stability of Mongolia’s investment environment and downward spiral of foreign direct investment inspired the government to propose amendments to the Law, which would enable the majority of suspended licenses to become active again. The prospect of reform and word of ‘special sessions of Parliament to weaken the Law’ (UMMRL, 2014) led to the formation of a more radicalised Fire Nation group within the UMMRL. In September 2013, the Fire Nation group and eleven other associations protested again in front of Parliament because of proposed amendments to the Law: their self-proclaimed goal was ‘to save our nation’ having sworn to give their lives ‘for national rights,’ arguing that the Government was in breach of the Constitution as the guarantor of environmental protection and citizen’s rights (Munkhbayar, 2014) (see Photograph Three below).

According to a UMMRL Press Release (UMMRL, 2014), the government led by the Democratic Party had ‘declared that the “Law with a Long Name” was an impediment to economic growth and the Gold Mining Association of Mongolia promised to quadruple gold output in exchange for weakened protection of rivers.’ A shot was allegedly fired during the protest and ten members of the movement, including Ts. Munkhbayar, were arrested. On January 21st, 2014, he and four others were sentenced to over twenty-one years in prison on charges of terrorism (Tolson, 2014). The trial of these activists eschewed

constitutionally protected rights to fairness and effective representation, highlighted by the fact that the trial was held in a remote detention centre where the activists had been interrogated.

Photograph Three

Symbolic protest against the revision to the Law on Prohibiting Mineral Exploration and Extraction Near Water Sources, Protected Areas and Forests

(Source: Baikal Basin Information Centre, 2017)



It is important to note the way that the Fire Nation movement perceived themselves as defenders of the national democratic constitution and positioned themselves as *citizen*-activists defending their local homelands (see Byambajav, 2014; Sneath, 2010). According to the formal Appeal to overturn the court's ruling (UMMRL, 2014b), the defendants stated that they were willing to 'resort to their own ways of handling this challenging situation' in circumstances where they deemed that the 'state becomes untrustworthy, when it ignores the rights of citizens to enjoy a healthy environment and turns living conditions and health into continuous suffering, when people are deprived of water, pasture land and wintering places.' It is clear from the Appeal (ibid) that the Fire Nation movement saw themselves as availing themselves of the rights and duties enshrined in the national democratic constitution:

Furthermore, as the events of September 16th 2013 were a manifestation of the constitutional duty to protect its country and nature, an act of voluntary coming together of citizens of Mongolia to form a not-

for-profit organization based on common views and beliefs (and should be taken as per clause 3.3, chapter 3 of the Criminal Law “no one should be persecuted for his/her beliefs and views”), all charges should be dropped.

As one of the leaders of the Onggi River Movement explained (author interview, November 2014), ‘the state has forgotten its reason for being.’ The purpose of the UMMRL, particularly under the leadership of Ts. Munkhbayar, ostensibly was to remind the state of its *raison d’etre*. Ultimately, the criminal sanctions of the state against the activists highlights the failure of *de jure* provisions in the national constitution to protect the civil and political freedoms of citizens, in contrast with the state’s renewed commitment to providing institutional protection for investment and investors’ rights as FDI plummeted.

Stabilisation Mechanisms I: Exclusion through Institutional Disassociation and State Criminalisation

The number of arrests were few following the 2013 protest events, but symbolic in terms of a shift in the state’s attitude towards dissident civic associations. The escalation of the protest movements between 2011-2014 coincided, and some would say were partially responsible for, the severe drop in foreign direct investment in 2013 and 2014. Their agitation for the enforcement of the environmental “Law with a Long Name” and the consequent suspension of mining licenses following the Supreme Court ruling signalled “state expropriation” to mining companies, a major sign of political risk in the investment environment. The criminalisation of the Fire Nation movement was an abrupt reminder of the state’s coercive power to re-establish boundaries around legitimate forms and expressions of civil society organisation.

The arrests of UMMRL leaders also led to its marginalisation within the MECC. In November 2014, at the National Forum for Environmental NGOs,⁵⁸ some members of the MECC wanted to remain loyal to the charismatic activist Ts. Munkhbayar – ‘Munkhbayar remains one of our heroes’ (author recording, President Damdinsuren, MECC, Speech at the 4th National Forum for Environmental NGOs, November 2014) – while others pushed to create institutional distance from them to maintain the image of the MECC as a professional and cooperative environmental institution. This latter point was demonstrated pointedly at the Forum to which only MECC-approved NGOs were invited. In the opening panel, a board member of the MECC – former State Secretary for the Ministry of Environment and Green Development – argued that there was a need for NGOs that have legitimacy and recognition from the government to take greater responsibility for regulating environmental issues. He argued that NGOs needed to work harder and become more professional, citing the lack of competitiveness among domestic NGOs as the reason why international NGOs were given greater roles. Using the River Movements as an example of non-professionalism, he advocated for the development of a professionalised NGO sector – ‘almost like a corporation’ – to spread specialised NGOs around the country: ‘we (MECC) need to produce the professional-level NGOs, giving them skills and capacity.’ He added that ‘we all have the same goal concerning the environment and nature, protecting it from harm, but we are making mistakes,’ saying that Munkhbayar’s damaged social and legal reputation reflected badly on the environmental NGO sector.

The Director of the MECC explained in an interview with the author that establishing a non-conflictual and cooperative

⁵⁸ Author observed this Forum.

approach with the government was critical in terms of legitimising and expanding the scope of the organisation's remit.

The majority of the population thinks sometimes that the MECC is kind of the same as the street movement, but it's not. MECC is more about providing the right information based on investigation and strategy and research, so that they can provide knowledge to the citizens, how to protect their rights... how to amend some laws, how to change the constitution etc... The MECC is not a political organisation, so our main concern is to run this institute in a classic way. It is supposed to be separate from political ways, and also try to prepare the next generation to run the MECC for the future in a very right, independent way. MECC's main role and hope is how can we pass environmentally healthy food and environment to our next generation. This is our main concern.

The Director emphasised that the MECC had become involved in environmental management rather than their previously 'judgmental' approach because the government was more willing to listen when they are cooperative. The Director explained, for example, that

In my personal opinion, our institution is the biggest NGO that could have a [big impact] on our society because our members, our board members, are mostly very welcome to advise [government] ministers. For example, the Ministry of Environment, Ministry of Mining and Ministry of Agriculture, all the ministers of their advisory meetings invite us to contribute our perspective.

When asked whether cooperation levels have increased or decreased with the government, the Director was emphatic:

It has increased enormously... We give advice on how [mining projects] affect the natural environment, not only in the shorter term but also in the longer term. So we give input and also require environmental safeguard instructions. Not only that, but we also give input relating to the social and biological effects [of mining]. We give the advice for major decisions for the Ministry of Environment...The only advice or instructions given [from NGOs] are from the MECC.

Environmental representatives from the MECC have also been included on the Minerals Policy Council, which was established in the 2014 amendments to the Minerals Law to help prevent legislative reform to the mining sector (see Chapter Four). The Ministry of Mining exclusively included environmental representation from the Mongolian Environmental Civil Council, reinforcing the status and institutional legitimacy of MECC-registered organisations.

While top-down civil society organisations like the Asia Foundation and the MECC have generally played a stabilising function within civil society, that role reinforced the state's increasingly hard-line position on the appropriate boundaries of environmental activism from 2013 onwards. Environmental activists engaged in *protest* were regularly portrayed as corrupt trouble-makers by pro-extractive government officials. For example, a senior mining policy-maker responded to the question "How has civil society changed in recent years?" by saying,

We have an Extractive Industries Transparency Initiative Council, headed by the Prime Minister, and one third [of the council] is from civil society. And they are maturing. We had a lot of civil society organisations [in the past] but some of them were very violent, they even took rifles, guns, explosives and tried

to attack the government because they believed the government was betrayed by the multinational corporations. They believe that the government is not for the people, just for the multinationals. Some of the so-called civil society organisations... it's kind of like a civilised robbery (author interview).

He described the civil society organisations as 'rent-seeking' by protesting against mining companies in order to get paid off, reinforcing the negative discourse around activism in the Mongolian media (see also Byambajav, 2015: 6).

Stabilisation Mechanisms II: Inclusion through Multi-Stakeholder Dialogue, Consensus-Building and the Narrative of “Shared Responsibility”

The post-2014 climate of civil society engagement can be characterised by the virtual monopoly of a “governance participation”⁵⁹ paradigm, which envisions a formal role for civil society in both the production and implementation of governance, crucially in collaboration – rather than confrontation – with industry and government partners. In this paradigm, NGOs and social movements are legitimate to the extent that they are a *constructive* voice within the mining governance framework itself. This new pattern contrasts with the way that the UMMRL and its allies lobbied for law reform within local and national state institutions, expecting the state to take direct, political responsibility for the negative effects of mining.

While conflictual social movements have been marginalised, the central government has given international organisations and the corporate sector political and legal space to provide consensus-

⁵⁹ I specifically use the term “governance participation” rather than participatory governance, as the latter suggests that governance is *constituted* by its participants, rather than the Mongolian case where the governance system appears to be pre-constituted in a pro-mining direction, regardless of the participation of civil actors.

based alternatives to ameliorate discontent with mining projects, particularly in rural areas. A specific narrative of social responsibility characterises the post-2014 “inclusive governance” paradigm, supposedly shared between “stakeholder” groups and informed by global mining governance norms and practices. The following section will give a brief overview of key aspects of global norms and practices for the social governance of the mining sector, which infuse the state’s governance paradigm for civil society organisations in Mongolia. This will be followed by three key case studies of the transnational transmission of these norms and practices into the Mongolian governance context through the Extractive Industries Transparency Initiative (EITI), the Integrated Mineral Resource Initiative (supported by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)) and the South Gobi Water and Mining Industry Roundtable (supported by the World Bank’s IFC).

Socialising the Market or Marketising the Social? Governing “Political Risk” for Mining Projects through the Norms and Mechanisms of Corporate Social Responsibility

In 2002, the International Institute of Environment and Development (IIED) published a report, *Breaking Ground: Mining, Minerals and Sustainable Development*, on the role of the mining industry in relation to ‘the global transition to sustainable development’ (IIED, 2002). The IIED was commissioned by the World Business Council at the behest of nine multinational mining companies⁶⁰ to ‘achieve a serious change in the way the industry approached today’s problems,’ (IIED, 2016) known as the Global Mining Initiative (GMI). The *Breaking Ground* report

⁶⁰ The nine companies involved were Anglo-American, BHP Billiton, Rio Tinto, Codelco, Newmont, Noranda, Phelps Dodge, Placer Dome, WMC Limited. Of these nine companies, six (Anglo-American, BHP Billiton, Rio Tinto, Phelps Dodge, Placer Dome and WMC Limited) have invested in Mongolia’s mineral sector.

has had a profound shift in affecting the global discourse of mining governance towards a connection with social and environmental sustainability. Dr. John Groom, representing Anglo-American, the mining multinational, in the GMI, reflected in 2012 (Buxton, 2012: 7) that,

The drivers for the GMI were a clear recognition that mining companies had problems of access to land, and access to markets, and cost of capital. The fundamental underlying reason was the reputation of the industry. To tackle this we would have to work with others and improve the way we worked. This is what drove [Breaking Ground] and started the process of stakeholder engagement. None of the problems have gone away, but the dialogue is much better informed and infinitely more constructive.

While the shift in principles has not always led to changed practice (Buxton, 2012), it has led to the development of a range of norms in the area of corporate socio-environmental governance, notably an emphasis on gaining a ‘social license to operate,’ local (vs. national) obligations, transparency/information sharing, gaining community trust and stakeholder participation. These emerging governance norms in the wake of the *Breaking Ground* report have been institutionalised globally in important ways by the international organisations, financial institutions, development agencies and corporate bodies that have played a strategic role in Mongolia’s mining governance regime.⁶¹ Large multinational mining

⁶¹ The United Nations Global Compact provides an overarching framework for sustainable businesses, with which specific industry bodies collaborate such as the International Council for Mining and Metals, which will be discussed below. The United Nations Global Compact has a General Assembly mandate to promote ‘responsible business practices and UN values among the global business community and the UN system’ (UN Global Compact, 2017), in line with the Ruggie Principles on Business and Human Rights. In light of the UN Guidelines and Guiding Principles, voluntary frameworks for global finance

companies that have been operative in Mongolia, such as Rio Tinto and Anglo-American, subscribe to voluntary codes of corporate practice promoted by global industry bodies. For example, the International Council on Mining and Metals (ICMM)⁶² promotes ten voluntary standards for mining companies based on principles of sustainable development, making positive social contributions and encouraging ‘collaborative action between governments, companies and civil society’ (ICMM, 2017).

The World Bank has played a particularly strong role in the promulgation of its ‘social development model’ in Mongolia, characterised by ‘approaches seeking to engage local stakeholder in participatory schemes, new “partnership” initiatives between the private sector and civil society, as well as new monitoring responsibilities assigned to both the state and the private sector’ (Hatcher, 2014: 13). The International Finance Corporation of the World Bank⁶³ is a major financier of the Oyu Tolgoi mining project, which has led to the introduction of its eight Performance Standards on environmental and social sustainability into the

have been created, such as the Equator Principles. As of 2016, eighty-four financial institutions have adopted the Equator Principles, which is ‘a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects’ (Equator Principles, 2017). The Equator Principles are globally applicable in the area of project finance and have ‘promoted convergence’ among multilateral financial institutions such as the European Bank for Reconstruction and Development and export credit agencies (ibid). The Equator Principles also incorporate World Bank guidelines and IFC standards into its UN-based standard-setting regime, reflecting the intertwined nature of these institutional developments (Equator Principles, 2013). In a similar vein, international organisations have created voluntary frameworks for companies that subscribe to the new ethos of social sustainability. In line with the UN framework, the International Standards Organisation (ISO) produced a specific voluntary standard in 2010 – ISO 26000 – on social responsibility to encourage businesses to ‘go beyond legal compliance’ when it comes to ‘contributing to sustainable development’ (ISO, 2014).

⁶² The ICMM body itself is the result of the landmark Mining, Minerals and Sustainable Development Project, established in 2001.

⁶³ The IFC is the private arm of the World Bank which finances private-sector led economic development.

Mongolian governance context. These standards incorporate principles of sustained “community engagement” and “impact assessment” into the terms of investment contracts with private entities and give recourse to a grievance mechanism for populations impacted by development projects (i.e., its Compliance Advisor Ombudsmen), should a company fail to uphold these standards.

The Extractive Industries Transparency Initiative (EITI) is another significant global governance initiative to promote the transparent and accountable management of revenues derived from natural resources. It developed out of ‘the intersection of a number of complementary agendas and overlapping transnational networks, particularly those concerned with corruption, conflict, and corporate social responsibility’ (Haufler, 2010: 54). However, it addresses these concerns through a market-based mechanism of ‘disclosure’ (ibid), based on the assumption that ‘[transparency] makes markets work more efficiently; enhances trust and cooperation; strengthens institutions; [and] reduces corruption and mismanagement,’ (ibid: 55) among other things.

The EITI has had a significant degree of influence in shaping notions of accountability in Mongolian mining governance. However, officially registered in Norway as a non-profit organisation, the EITI operates globally. Based on a correlation between resource wealth and corruption, the EITI creates an international standard whereby participating governments disclose the amount that they receive from companies, and these companies disclose what they have paid (EITI, 2017). It was initiated by former British Prime Minister Tony Blair in 2002, in response to an emerging consensus among the global development community of international financial institutions,

NGOs, and prominent development economists about the corruption effect of dependency on natural resources, a key element of the “resource curse” (Aaronsen, 2011: 52-53). Thus, since its inception, the EITI has been intended by its proponents to serve as a global anti-corruption standard. The EITI framework has gradually become more comprehensive over time, with the introduction of the revised EITI Standard in 2013, which ‘makes better linkages to wider reforms’ in each country, according to the Head of the EITI Secretariat (Moberg, 2013). This ‘contextual’ approach is a hallmark of the revised Standard, which goes beyond original reporting expectations, to include balancing what governments received overall with what companies paid. The revised Standard requires disaggregated reporting, to include details of individual payment type as well as specification of company, government agency involved and the particular project. It also brings SOEs, subnational transfers to local governments and social spending by companies into its transparency remit. Countries are encouraged to go beyond the minimum reporting duties set out in the standard, to include other critical areas of governance.

The idea of a socially responsible extractive industry has also been adopted by international development agencies as well as global industry and finance bodies. A relevant example of this for the Mongolian context particularly is that of the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), the German ‘federal enterprise’ that provides ‘international cooperation services’ (GIZ, 2017) in over 130 countries. Predominantly commissioned by the German Federal Ministry for Economic Cooperation and Development, GIZ also works closely with private partners, ‘fostering successful interaction between development policy and trade’ (GIZ, 2017b). GIZ’s core value is the promotion of sustainable development more generally. In the

Mongolian case, this value is expressed through the Integrated Mineral Resource Initiative (IMRI) by supporting the creation of 'platforms to facilitate constructive communication between the local population, local government and businesses' (GIZ, 2017c).

Within the multiplicity of institutional contexts for "socially responsible" business practice, the mechanisms and norms that are proffered for the mining sector reinforce each other and are essentially uniform in substance. The mechanisms of making mining companies socially responsible in this framework are information-sharing systems (including transparent impact assessments), multi-stakeholder platforms for dialogue and collaborative monitoring processes, which reflect corporate values of negotiation and "due diligence." While many initiatives are voluntary, some protocols are enforced through investment obligations to financial institutions, such as the International Finance Corporation's Performance Standards. These avenues of redress, however, are 'soft' in nature, preferring conciliatory measures such as mediation rather than the formal adjudication of disputes. For example, the World Bank's CAO is not a third-party independent mechanism; it reports directly to the President of the World Bank and is comprised of World Bank employees.

Despite the diversity of opportunities for corporate social responsibility (CSR) and the various levels of obligation companies can accede to, I was hard-pressed to identify CSR norms and practices in the global governance toolkit that are not basically market instruments, 'strategic tool[s] to achieve economic objectives, and ultimately, wealth creation' (Garriga & Mele, 2004: 53). I do not mean to discount the ethical intentions of individuals working to enhance the social responsibility of mining companies, but I would argue that the material function of global CSR norms and mechanisms, at least as practiced so far in

the Mongolian mining context, has been to secure access to “natural resources” and protect the process of extraction, both in mineral and surplus value terms. As Vogel (2005: 2-3) put it in *The Market for Virtue*,

There are many reasons why some companies choose to behave more responsibly or virtuously in the absence of legal requirements. Some are strategic, others are defensive, still others may be altruistic or public-spirited... But in the final analysis, CSR is sustainable only if virtue pays off. The supply of corporate virtue is both made possible and constrained by the market.

In the following section, I will examine the way that global norms and practices have been transmitted into the Mongolian context through three key projects: the EITI, GIZ’s Integrated Mineral Resource Initiative (IMRI) and the IFC’s South Gobi Water and Mining Industry Roundtable (SGWMIR). In particular, I will discuss the way that the norms of community engagement and collaboration inform the practice of “multi-stakeholder management” in the context of these projects, noting the powerful role of norm transmission played by the international institutions and organisations behind them. These projects have been chosen as case studies because they evidence the power of international institutions (e.g. IFC) and organisations (e.g. GIZ, EITI) in setting standards and introducing new “socially responsible” governance practices in the mining sector that have the sanction of the state, in contrast with some sections of ‘politicised’ civil society (i.e., the River Movements) which have been delegitimised.

The Extractive Industry Transparency Initiative: Win-Win-Win?

What is the [EITI’s] theory of change, as it were? The constitution of a multi-stakeholder dialogue and

group... to increase accountability and development for the country. There are a number of key tangible benefits, really. The first is to support evidence-based debate. One must agree on the facts and get all three stakeholder groups to agree on the basic facts of the sector. This makes for good debate and good policy. On the other hand, by having these three stakeholder groups on these national commissions - multi-stakeholder groups - one sees a process of trust-building... We also see a process of improved community relations, and perhaps our friends from Mongolia can tell us a bit more about this through their process of sub-national implementation. By collecting information that is relevant to communities, one increases the understanding of these communities and creates links between national and sub-national communities, government and companies.

- Alex Gordy, EITI Country Manager for East Asia, speaking at the G7 Fast Track Partnership Conference on the EITI, author observation

The EITI promotes a multi-stakeholder model of accountability through an anti-corruption framework. It creates opportunities for some form of accountability within a market-based paradigm, through the production of transparent information about revenue payments and receipts in resource-rich economies (Haufler, 2010). However, a significant underlying motive of this transparency drive is to remove political risk from the business environment, by targeting state corruption. As Aaronsen explains in relation to the 'limited partnership' of the EITI (2011: 51), 'corporate executives are increasingly aware that corruption not only affects profits, but also increases business risk.' Notably, the framework of corruption that animates the EITI focuses on holders of *public* power (i.e., state institutions), although private companies are encouraged to declare their payments as well.

The EITI has been increasingly recognised as a ‘founding principle’ (Sh. Tsend-Ayush, Ministry of Mining quoted in Carter and Davaanyum 2015b) to shape accountable state-society relations in the development of Mongolia’s mining policy. The EITI in Mongolia is comprised of two multi-stakeholder organisations – the National Council and the Working Group – and a national office of the EITI Secretariat based in Ulaanbaatar. Sub-national Working Groups are in the process of being established within mining regions, to expand the EITI to inform ‘dialogue between mining companies, mine-affected communities and local government’ (Adam Smith International, 2014).

The National Council functions as the coordinating and monitoring body of the EITI, chaired by the Prime Minister and his deputy, the Minister of Mining, with a mandate to meet at least once a year. Civil society, industry and governmental stakeholders are equally represented on the Council with ten seats respectively. The Working Group functions as the main site of EITI governance implementation, meeting at least four times a year. Similar to the National Council, each group of stakeholders – civil, corporate and governmental – are equally represented in a body of thirty-three members. In a recent Asia Pacific Memo (Carter and Davaanyam, 2015), the Stakeholder Superintendent at Oyu Tolgoi LLC described the EITI as a ‘platform where government, civil society and extractive company sit together in equal level, with equal rights, with equal responsibility.’

The EITI’s multi-stakeholder approach creates institutional space for the expression of interests related to mining, representing different sectors – economic, political, civil – and also the specific agendas of powerful organisations from that triad. The emphasis on equality of standing and responsibility appears to offer a significant political opportunity for civil organisations to address

political and economic actors from a position of strength. At one level, this is true: the EITI is a helpful institutional development in the sense of tracing revenue flows and mitigating bare-faced corruption on the part of the state or mining companies.

However, apart from counting numbers within the agreed framework, the EITI does not offer a platform to contest the way in which accumulation or redistribution of mineral rents occurs in the first place. It functions as an oversight mechanism and a data generator, which arguably also contributes to the stability of the investment environment by giving other investors indicators of the state's corruption performance. Furthermore, information and data tend to be portrayed in the EITI in technical terms, but agreeing on "facts" is not a simple exercise. Furthermore, the anti-corruption framework of the multi-stakeholder model of the EITI reinforces clear divisions between political (government), economic (industry) and social (civil) arenas. The reality of hybridised governance in the mining sector, with corporate actors having increasing influence, particularly in the implementation of governance at the level of impact, means that the actual configuration of power in the mining sector is not adequately conceptualised – or held to account – in the EITI's tripartite framework.

As one mechanism of many, the EITI's limited focus on transparency may be appropriate and helpful. However, the EITI is *the* major "accountability" institution in Mongolia's mining sector at the national level, and has recently been introduced at the sub-national level. This is an incredibly powerful position for a global governance framework to hold in relation to Mongolia's mining governance regime. The EITI's narrow focus on developing cross-sector consensus on financial data and revenue transfers averts attention from broader processes of

entanglement between the state and investors within the new extractive political economy (see Chapter Four).

The Integrated Mineral Resource Initiative and the GIZ: Institutionalising Multi-Stakeholder Norms and Practices in the Mining Sector⁶⁴

For long-term sustainable development, it is of utmost importance that all Mongolians can benefit from their country's resource wealth. Therefore, it is crucial to have in place a reliable business environment and to ensure good governance. Let me repeat. It is crucial to have in place a reliable business environment and to ensure good governance...The German EITI partnership fits well into our bilateral cooperation with Mongolia to support sustainable development [for] almost 25 years.

- *H. E. Gerard Thiedemann, Ambassador of the Federal Republic of Germany to Mongolia, speaking at the G7 Fast Track Partnership Conference on the EITI, author observation*

The GIZ, Germany's development implementation agency, has played a key role in supporting the EITI in Mongolia since 2014 under the auspices of its Integrated Mineral Resource Initiative (IMRI). Initially, in 2010, the GIZ's work in Mongolia was mainly focused on supporting the Mongolian government through its Investment Policy Advisory Service programme, as well as working with mining companies on their CSR efforts. This programme was expanded in terms of its remit and financing following a visit from the German Minister for Development and

⁶⁴ The data for this section was acquired through attendance at the GIZ-sponsored 'G7 Fast-Track Partnership Conference on the EITI', November 10-11th 2015, analysis of GIZ promotional publications for the Integrated Mineral Resources Initiative (IMRI), and an interview with a senior representative from the IMRI project.

Economic Cooperation, Dirk Niebel. Minister Niebel advocated that an additional three million euros be committed 'for advisory services and training in connection with development-oriented use of Mongolia's mineral deposits' (BMZ, 2010). In a meeting with the Mongolian Minister for Mineral Resources and Energy he stated that,

The best poverty reduction tool is endogenous economic development. The mineral resources sector is the key to this. We want to support Mongolian efforts to exploit the country's resources in an environmentally responsible way so that there are lasting benefits for the population. At the same time it is important to note that the rule of law and good governance constitute essential conditions that are vitally necessary when trying to woo foreign investors, particularly medium-sized enterprises. (ibid)

While Germany itself has no mining companies and is closing its own coal industry in 2018, the IMRI supports broad-based social and economic development through 'capacity building' in public institutions and providing expertise on the sustainable management of mineral revenues (GIZ, 2017c). Prior to the elections in 2012, the IMRI worked primarily with a partner agency in the government – the National Development Innovation Committee – which was directed by the Prime Minister's office. Following the disbanding of this committee in 2012 after the election, the IMRI shifted focus from national level governance to supporting sub-national administrations in Mongolia's *aimags* to engage with mining companies, local businesses and civil society organisations in their jurisdictions. However, the IMRI is still supported institutionally by the Ministry of Industry and the Ministry of Mining.

The IMRI provides training and support for each of four stakeholder groups in sub-national jurisdictions (mining companies, local businesses, civil society organisations and government) to enable a relatively even plane of negotiation, which was the initial focus of the programme (2011-2014). The purpose of this training and support is ultimately to enable the formation of ‘multi-stakeholder platforms’ (GIZ, 2015) and to facilitate ‘public-private dialogue’ under the rubric of the Integrated Community Development Partnership (ICDP) concept (GIZ, 2015: 3-7). The *aimag* administrations are supposed to hold the “public” position in the dialogue, and the three other stakeholders are treated as “private.” In the ICDP concept, each stakeholder group is supposed to constitute itself organisationally and choose representatives who will engage in the facilitated negotiation of an “Inclusive Sustainability Agreement,” as a basis for negotiating LDAs as required by national law.

The ICDP concept and platform has a unique place among other multi-stakeholder initiatives led by donor organisations in Mongolia, which tend to focus on specific issues or groups, such as revenue transparency, environmental civil society and herders’ rights. In contrast, the ICDP concept extends multi-stakeholder dialogue to a new level by trying to institutionalise its organisation and practice in a way that includes most local issues related to the mining sector: effective public governance, the functionality of the local economy, sustainability of the environment and local social priorities. The rationale of the “inclusive” aspect of the ICDP maintains that the solution to the economic, environmental and social problems that arise with mining must be collective and collaborative. According to a senior representative at the IMRI (author interview), this collaborative approach can be a challenge to develop in practice, given the

reality of power disparities between different stakeholder groups:

It's not possible to solve [all these problems] as an individual stakeholder group. "One against the other" clearly doesn't work. No matter how loud they shout and how radical their activities are, people understand that it needs a kind of inclusive approach... The problem is that their relationships are clearly asymmetrical. Asymmetrical when it comes to knowledge, when it comes to power, when it comes to money, when it comes to other resources.

Consequently, the express purpose of the first phase of the ICDP project was to develop the negotiating power of each stakeholder group prior to a multi-stakeholder dialogue so that its outcomes could be as fair as possible:

We find it necessary to create some sort of fundamental basic principle knowledge of the topics [to be negotiated] before we send them into the arena, so that they have a reasonable chance to meet on a level playing field and understand each other and speak the same language... (ibid)

In this way, the IMRI 'aims at a harmonisation of interests between these interdependent actors in the public and private sectors' (GIZ, 2015: 5). Similar to the EITI, the aim of the IMRI is to create a sense of mutual interest between civic, state and corporate actors. However, the model of "public-private dialogue" resembles a private negotiation of a contract, where each actor is responsible to negotiate their position and the outcome is a just one, as long as each party has sufficient resources and knowledge. Similar to Local Development Agreements (see Chapter Four), the ICDP concept that underpins the IMRI rests on the ambiguous notion of "stakeholding." While the IMRI has made a laudable

effort to 'level the playing field,' it contains social conflict in mining-impacted regions within a distinctly *business-like* mode of deliberation, representation and decision-making, vis-à-vis the interaction of "stakeholders." As Crane et al. (2008: 90) put it,

The notion of a "stakeholder" is, on the surface, very simple, but at heart, deceptively complex.

Despite being ubiquitous in corporate governance and management discourses, the process of determining 'what constitutes a legitimate stake, and how different stakes should be evaluated' (ibid) is far from straightforward. As White (1996: 7) argues, there are two questions related to *who* participates and what *level* of participation a stake gives to its holder. This process-related complexity is particularly exacerbated when the concept is deployed beyond the boundaries of a corporate organisation, to include diverse groups of actors with *non-economic* stakes in the future of a mining project. Particularly when the coordinator or initiator of "multi-stakeholder negotiations," such as GIZ, is not local to the "community," there are serious risks that local complexities and hierarchies (e.g., gender, livelihood base, political affiliations, age) will not be recognised in the formulation of stakeholder groupings (see also, Li, 2007: 192-229).

In this sense, the stakeholder concept is an *imposed* concept: it is not indigenous to local social or political institutions but derives its value from its "business-friendly" association with corporate governance. While the stakeholder framework may be appropriate for intra-organisational conflict in companies where employees are already *participants* in the organisation, it poses significant normative and practical problems when laid over pre-existing socio-political governance arrangements. For example, employee stakes in an organisation are mediated clearly by

employment status and contractual relations with the employer. In contrast, the determination of stakeholder status for a particular project within a representative democratic system of national governance is a deeply ambivalent process. It is difficult to draw boundaries around the sphere of impact, particularly for large mining projects, and even when boundaries are decided upon, it is yet another ethical and practical question of how to engage stakeholders in a participatory process. Who is engaged? On what terms? Participation, as White (1996: 7) argues, 'can take on multiple forms and serve many different interests.' This dilemma is particularly exacerbated in light of the fact that, in the case of the IMRI, it is an influential Western development organisation doing the "engaging" with rural populations.

Not only does the concept of stakeholder participation obscure the very *political* process of "multi-stakeholder negotiations" in general, but more specifically displaces "community" relations from their social context and into a new market-friendly arrangement. Despite the "social" and "community" discourse, these arrangements are a unique technique of governance for the purposes of protecting the mining economy from political risk. As Li (2007: 234) puts it, the emphasis on community in the governance of development projects belies a deeply political motivation, that of making 'collective existence intelligible and calculable' for the purposes of risk assessment.

The International Finance Corporation and the Multi-Stakeholder Water Management in Mining Project⁶⁵: Critiquing the “Social” Power of Mining Companies

‘If you have the social license to operate, all the [mining] activities will go better, right?’ (IFC Consultant A, author interview)

As discussed earlier, the IFC occupies a strategic place in the global governance of mining projects through its Performance Standards, which are social and environmental responsibility obligations enforced through investment contracts for development projects. In Mongolia particularly, the World Bank Group as a whole⁶⁶ has been an active institutional agent in the formation of Mongolia’s mining regime (Hatcher, 2014: 140). As described in Chapter Two, the World Bank played a pivotal role in the development of Mongolia’s 1997 Minerals Law and inaugural investment conference that same year. Since then, the World Bank has provided critical institutional development assistance and foreign direct investment promotion in conjunction with the government of Mongolia, ‘targeting the overall policy, fiscal, legal, regulatory and institutional frameworks for the mining and extractive sectors’ (ibid: 111). Furthermore, as a major financier of the Oyu Tolgoi project, the IFC has become a key institutional actor in the area of socio-environmental governance as its CSR standards have been introduced into the Mongolian context through this nationally strategic project. The Oyu Tolgoi project is

⁶⁵ The data for this section has been acquired through cited IFC publications and in-depth interviews with IFC consultants on this project.

⁶⁶ The World Bank Group includes the World Bank (national development assistance), the International Finance Corporation (development through investment in the private sector) and Multilateral Investment Guarantee Agency (political risk insurance guarantees for private investors and lenders).

also insured by the World Bank's Multilateral Investment Guarantee Agency.⁶⁷

In 2012, the IFC initiated the first phase of its South Gobi Water and Mining Industry Roundtable (SGWMIR) project after consultation with its client, Oyu Tolgoi, in the context of growing conflict between the company and local residents around water and other issues of socio-environmental impact. For example, in December 2012, a group of herders impacted by the Oyu Tolgoi project made a complaint to the Compliance Advisor Ombudsmen of the World Bank Group. Soon thereafter, in 2013, the *khural* of Umnogov *aimag* passed a resolution to ban the use of groundwater for mining projects,⁶⁸ in the context of growing public anxiety about the depletion of water resources. Following the 2013 legal conflict around groundwater, an IFC Discussion Paper (Darling et al., 2014: 34) stated that 'mining companies realised they needed a platform to identify shared challenges, successes and common ground for collaboration on the social and technical management of water in the South Gobi.'

The SGWMIR project set up two roundtables for mining companies in the South Gobi region, one for company 'decision-makers' and another for 'boots on the ground' (ibid) staff who work in areas like community relations. The goal of both roundtables was 'three-dimensional': to 1.) develop 'short and medium-term action plans to improve internal alignment' 2.) 'use multidirectional communications on water management' and 3.)

⁶⁷ Political risk insurance offered by MIGA covers 'five non-commercial risks': 1. currency inconvertibility and transfer restrictions, 2. expropriation by the state, 3. war, terrorism and civil disturbance, 4. State breach of contract, and 5. Non-honouring of financial obligations. (MIGA, 2015) Notably, demand for 'political risk insurance products' has doubled since 2010 (MIGA, 2015b.)

⁶⁸ Umnogov *aimag* is the most intensive region of extraction in Mongolia, given the volumes and range of minerals – coal, copper, gold – that lie in this large region of the Gobi desert. At least thirteen mining companies are currently operating in the province, which is home to two of the largest mining projects in the world: Oyu Tolgoi (copper and gold) and Tavan Tolgoi (coking coal).

‘co-managing knowledge and other resources with other decision-makers’ (ibid: 8) which correspond with shared risks, shared realities and shared responsibilities. ‘Internal alignment’ refers to ‘raising awareness of the responsibilities, realities, and risks of water management across business functions’ (ibid). Amongst other things, internal alignment entailed a process of information sharing between mining companies about water management techniques and engaging in what is called ‘peer-to-peer learning’ (ibid: 34). The aim of this process was to standardise mining companies’ approach to water management by developing ‘symmetric standards and policies’ (ibid). This process culminated in February 2016 with the signing of a Voluntary Code of Practice (VCP) by eight mining companies operating in the South Gobi.

Among the signatories of the VCP are significant operators in the Gobi, including Oyu Tolgoi, Erdenet Tavan Tolgoi and Energy Resources. These three major mining companies are all in receipt of financing from either the IFC or the European Bank of Reconstruction and Development, which entails social and environmental responsibilities through investment performance standards. The VCP includes nineteen obligations which cover participatory monitoring programmes, grievance mechanisms for residents, the impact of mining on water for pastureland, the transparent measurement and publication of water data ‘in a format accessible to local communities’ (Elbegsaikhan, 2016). The Government of Canada, the EBRD and the International Council on Mining and Metals provided external support for the development of the VCP (IFC, 2016), again highlighting the role of international institutions and organisations in providing the institutional foundation for “socially responsible mining.”

The implications of this development are significant in the sense that it evidences the normative standard-setting power of global governance actors like the IFC and the institutional consolidation of corporate power in a strategic extractive region. Rather than having mining companies at odds with each other, the SGWMIR sought to enable collaboration between companies over their shared “risk” as water-dependent companies. The project also sought to standardise their approach to operate as a semi-cohesive bloc in relation to regional water governance. More specifically, in the case of Mongolia, the development of corporate roundtables through the SGWMIR directly enhances their lobbying power on the multi-stakeholder councils for the newly formed River Basin Administrations (RBAs) which allocate permits for medium to large-scale water use (i.e., for mining projects). This is an implicit part of the IFC strategy. Notably, the World Bank has supplied the development funding for the creation of three strategic RBAs in the South Gobi through its Mining Infrastructure Investment Support Project (P118109). These are the most controversial RBAs, given the extent of power local governments have to lose through the delegation of decision-making authority to these new administrations which are supposedly determined by hydrological as opposed to political boundaries (IFC Consultant B, September 2014). One of the hoped-for outcomes of the SGWMIR was to institutionalise representation of the companies involved in the consultative councils for the RBAs (ibid).

The second dimension of the SGWMIR focused on mining companies’ communication strategies with the local population and *soum/aimag* authorities. The amelioration of anxiety about water through dialogue with local residents is seen by the IFC as crucial to the stability of mining projects. According to the IFC’s 2014 *Water, Mining and Communities* report, gaining ‘tacit

community approval of a project, specifically around water and a company's stewardship of it, can play a direct role in a government's decision to grant additional exploration or mining licenses and necessary water use permits' (IFC, 2014: 15). The IFC puts this 'social and political license' forward as an important 'value driver' for companies to engage (ibid). One of the core stated objectives of using 'multidirectional communication' is to use 'communication and engagement as a form of risk management' (ibid: 25) In this framework, companies produce objective and scientific knowledge about water, whilst still engaging with 'trust and empathy' (ibid) to 'assuage fears, suspicions and anxieties.' (ibid: 17).

Thirdly, not only must the local nomads' perceptions be adjusted to face "the facts," but they are offered the opportunity to become co-managers with mining companies through participatory monitoring. The logic of 'co-managing knowledge and other resources' (ibid: 8) is evidently supposed to develop a sense of *shared responsibility* for the future of water. For example, in addition to participatory monitoring in the South Gobi as part of the SGWMIR project, an Integrated Water Resource Management training module (ibid: 35) was offered by the companies to 'broader stakeholder groups – government, civil society, communities, academia and media' for the purpose of 'building knowledge for informed and increased co-management of water.' The Report (ibid: 17) puts it this way:

Educating the community about technical aspects of mining and water, understanding traditional beliefs and the community's use of water, incorporating those values and uses into water management, and providing opportunities for stakeholders to participate in the development and monitoring of water plans can reduce misconceptions.

The SGWMIR is thus imbued with the global discourse of CSR, particularly through the distinctively “social” – as opposed to political – language of “community”, “social license” and “participation.” The inherent hierarchy of the relationship created by the imbalance in economic and discursive power between large-scale mining companies and the predominantly pastoralist residents of the South Gobi is not overtly addressed within this conception of their “social” relationship. The SGWMIR is framed by the IFC as a “win-win” solution for companies and communities, without an evaluation of how such an initiative could expand and consolidate the influence of the private sector on critical aspects of water governance and the terms of its contestation.

Drawing on the discussion of the IMRI case study, there is strong reason to be wary of the language of community and participation in the SGWMIR project. It obscures the reality of ‘boundary work’ (Li, 2007) in these “collaborations,” where conflicted relations are re-translated into collaborative terms without transforming the ‘material roots’ (Li, 2007: 263) of the conflict. Even though the IFC and corporate facilitators of a participatory process like the SWGMIR may put the community at centre stage in the name of autonomy, participation and empowerment, the deeper function of such initiatives is evidenced in the motivations of the project initiators. As the quotes from the IFC Report (2014) indicate, the driving purpose of the SWGMIR, like many participatory programmes initiated by the World Bank (see Li, 2007: 230-269), is to “help” local communities learn ‘how to conduct themselves in competitive arenas, and [make] appropriate choices’ (ibid: 263) in the context of a market economy.

Summary of Case Studies

In the Mongolian context, the emerging global framework of norms and practices around what is considered socially responsible corporate behaviour has been influential in shaping the way that mining companies systematically engage with Mongolian citizens. In the absence of a national legislative framework for the impacts of mining on critical aspects of rural social life (i.e., herding livelihoods, the cultural and spiritual value of land and water) (Erdenebolor & Baigal, 2012),⁶⁹ international institutions and organisations have introduced global governance norms and mechanisms in conjunction with investors and mining companies to ameliorate conflict around mining projects. The localisation of the social impacts of mining implicates the state because of its active role in limiting these conflicts to provincial and regional spaces of negotiation. In turn, this localisation has enabled the entry of global governance norms into rural political environments.

The amelioration of local social conflict by IFIs and international organisations has introduced a new “social” frame to corporate-citizen relations that still operates along (political) lines of exclusion-inclusion. For example, groups of residents impacted by mining projects become the “affected community,” but the boundaries about who is included in “the community” are determined on a case by case basis in the context of negotiations between companies and local representatives (Erdenebolor & Baigal, 2012). This process naturally depends upon political decisions about which level of local government to engage, which civil society organisations to include and which ‘other’ community groups to recognise as legitimate representative of the “community” (ibid: x). Fundamentally, the substance of

⁶⁹ Apart from the provision for local development agreements in the Minerals Law (see Chapter Four) and the new template for LDAs, there is no specific legislation to address or assess the social impacts of mining.

Mongolian citizenship for rural communities is in the balance, as corporate and state institutions and actors try to find collaborative solutions to the problem of local “political risk” to mining projects. The reality is that the ideal of multi-stakeholder negotiations are, in fact, riven by local hierarchies around “community” representation, not helped by the local perception of inequality in their treatment by different mining companies (ibid: vi).

The coercive quality of projects like the SWGMIR and the IMRI is subtle, as they contrast with the top-down mode of state bureaucratic planning backed by military power, characteristic of the socialist period of state transformation. However, in the new era of the extractive market economy, these social governance schemes have their own coercive power, seeking influence over local knowledge, consent and cooperation, exercised through *economic* forms of material and normative power. ‘Empowerment is still a relationship of power’ (Li, 2007: 275), just as participation is an inherently political issue: ‘there are always questions to be asked about who is involved, how, and on whose terms’ (White, 1996: 14). The fairly ubiquitous notion of “community capacity building” – i.e., ‘that communities need to be enabled to actively present and protect their interests’ (Erdenebolor & Baigal, 2012: vii) – uncritically accepts the governing power in that “empowerment.” Furthermore, “community” access to corporate processes of recognition and redress is usually determined by whether or not they have experienced “direct” or “indirect” impact by the project or by having a special status. Again, this depends upon recognition by the company and the strategic representation of impacted populations by their political representatives and NGOs, as a 2012 research study of ‘social impacts and stakeholder interactions’ in mining-impact areas attested (ibid).

For example, herders impacted by a mining project may be given special group status by a company even in the absence of state recognition.⁷⁰ The standards against which claims can be made by communities are based on one or a combination of the following: the company's private principles, global industry values and shareholder standards imposed through investment contracts on the company (for specific examples of claims, see Gobi Soil NGO 2013; 2013b; CAO, 2017). In this way, mining companies and banks can become political and juridical actors in the governance of sub-national claims, depending on the orientation of the particular company to the global governance milieu of norms and mechanisms. The spread of corporate norms and mechanisms does not occur evenly across all mining projects in Mongolia, but substantively depends upon the company involved, its obligations to its shareholders and particular organisational ethos. While utilising multi-stakeholder channels may have strategic value for local residents and civil society organisations in the short-term, the trajectory of a consensus-based terrain for state-corporate-civic relations, backed by the state's coercive power, is more significant for this thesis.

Conclusion

In this chapter I have analysed the process by which parameters for civic engagement in the governance of the mining sector following the crisis of foreign investment in 2012-2013 have been established through state action and corporate initiatives. The crack-down on confrontational protest and resistance to widespread mining coincided neatly with the government's renewed commitment to stabilising the investment environment from the unstable influence of "nationalist" politicians in

⁷⁰ This is especially the case where companies are financed by institutions such as the IFC or the European Bank for Reconstruction and Development, which have specific protocols for dealing with impacts on people with 'land-based' livelihoods (i.e., IFC Performance Standard 1).

Parliament and “corrupt” local governments under the 2014 State Policy on the Minerals Sector. This stabilisation impetus also extended to non-state institutions, particularly dissident NGOs and social movements that had engaged in and encouraged direct action protests against the government and specific mining projects. Major donor organisations withdrew financial and political support to these associations, which were ultimately side-lined within the Mongolian Environmental Civil Council following the arrest and imprisonment of five River Movement leaders under charges of environmental terrorism. This violent closure of political space for dissident civic mobilisation has left consensus-based alternatives, primarily informed by global norms and mechanisms, as the dominant *modus operandus*. These consensual frameworks, exemplified in the three case studies examined in the second half of this chapter, may have some immediate utility for mining-affected populations, but are fundamentally part of an enabling constitutional framework for extractive development. The “social” has been effectively co-opted into the apparatus of pro-extractive governance, despite the rhetoric of inclusion and “community engagement.” The implications of the state’s stabilisation agenda in the extractive sector for the overall democratic constitution of the Mongolian state will be analysed further in the next chapter.

Chapter Six (Conclusion)

New Constitutionalism on the 'Final Frontier': Some Implications for the National Democratic State of Mongolia

Introduction

Mongolian politicians have now learnt the lesson that they can damage the economy with too much resource nationalism.

- *O. Chuluunbat, Former Vice-Minister of Economic Development (quoted in Oxford Business Group, 2015)*

The previous four chapters provided an empirical overview of Mongolia's integration into the global minerals economy through the lens of state transformation and transnational legal ordering. The overarching theme running through all four chapters is the negotiation of the state's relationship with capital over time: 1.) through the transition to industrial capitalism and alignment with the Soviet Union (1921-1990); 2.) in the post-socialist context of democratisation and dependency upon multilateral financial institutions; 3.) through dependency on foreign direct investment and mineral exports; and 4.) by consolidating Mongolia's reputation as a competitive and stable destination for foreign investment in the mining sector. Chapter Two set out the historical complementarity between state formation, production, and accumulation in the Mongolian context, noting that the creation of an economic sphere as separate to the political was a gradual process achieved during the socialist period. The post-socialist transition process institutionalised and deepened this separation through the marketisation of Mongolia's economy in the early 1990s. Chapter Three provided a chronological

overview of the main legal and political dimensions of investor-state conflict between 1994 and 2014, specifically the way that the revisions of the mining regime reflected a form of constitutional bargaining between the state, and its national political constituency (voters) and its transnational economic constituency (foreign investors). In 2012-2013, Mongolia suffered a major crisis of foreign direct investment in its mining sector as a result of investor backlash against the alleged “resource nationalism” of the state, which was compounded by the downturn in global commodity prices for minerals and Mongolia’s huge burden. I argue that the “economic” crisis of FDI functioned as a constitutional crucible to strongly shape, if not resolve, the conflicted sense of national and global priorities within the state, firmly establishing the primacy of protecting the flow of global capital, along with investors’ rights and preferences, over other socio-political interests and economic possibilities. The state’s primary dependency on foreign capital consolidated the global ordering process that had begun following Mongolia’s integration into the global minerals market as an exporter of primary commodities in the late 1990s.

In Chapters Four and Five, I analysed institutional and normative reordering processes along three different axes of state power: within the central state itself (intra-institutional); between national and sub-national levels of government (inter-institutional); and between the state and civil society (state-society relations). Some might argue that these three axes of reordering could be analysed as separate phenomena, but I argue that they make comprehensive sense in relation to an underlying reorientation of the state to transnational capital in the context of global economic integration. The Mongolian navigation of its “global” position in relation to transnational capital investment is

the underlying social context in which these three distinct but interrelated programmes of reform took place.

This chapter concludes the thesis by examining the overall processes and implications of the current “global capitalist” phase of state transformation in Mongolia. The 2014 legal and policy reforms in the mining sector, where the state reverted to a liberal model of economic regulation, should be understood as a process of transnational legal ordering (Shaffer, 2014), with significant constitutional implications for the democratic state of Mongolia. Despite the ongoing inter-dependency of capitalist accumulation and the legal-political frameworks provided by the state, there are losses for national democratic forms of the state as it reorients towards accumulation strategies based on harnessing global capital flows. I will firstly argue that the 2014 reforms to Mongolia’s mining regime should be conceptualised as a transnational legal ordering process, and then outline the democratic losses and risks at stake in such a transformation.

Transnational Legal Ordering

As I outlined in Chapter One, integrating into the global economy requires a huge amount of political and legal change for national states, so much so that economic integration has been framed in the literature as an emergent form of “new constitutionalism” because of its ‘constitution-like’ (Schneiderman, 2013: 6; Schneiderman, 2008) characteristics and effects (i.e., redrawing the boundary of legitimate state action in the economy). In Chapter One, I indicated some of the legal dimensions of economic integration into the global minerals economy. I highlighted aspects of domestic legal reform and entry into a complex ‘interlocking web of rules and rule-enforcing structures’ (Schneiderman, 2008: 25) that exists in the transnational space of international economic law, bilateral and multilateral investment

treaties and contracts, “soft” global governance norms, and cross-border commercial transactions. As Shaffer (2014: 4) proposes, transnational law generally refers to ‘legal norms that apply across borders to parties located in more than one jurisdiction.’ This helpfully includes not only public and private international law as separate categories, but also the ‘*interaction* of publicly and privately made law’ (ibid, emphasis added). A complex array of regulatory norms regulate the global economy, some public, some private, some binding, some non-binding. According to Shaffer (ibid: 1-2), viewing global economic integration as a transnational legal ordering *process* recognises the way that ‘these norms are constructed, carried and conveyed, always confronting national and local processes, which may block, adapt, translate or appropriate a transnational legal norm.’

The socio-legal approach to the study of transnational legal ordering tends to focus on transnational norms as a ‘source of legal change within a national legal system’ (ibid: 5). In the Mongolian context, I have examined the way that the stability of the legal and political environment has become a normative prerequisite for law and policy-making in the mining regime in the context of the FDI crisis in 2012-2013. The primacy of stability, not only as a guiding principle for law and policy development but also as a catalyst for structural reform, indicates that a more profound transformation has occurred within the institutions of the state in relation to the market. In his book, *Transnational Legal Ordering and State Change* (2014), Gregory Shaffer outlines five ‘dimensions of state change’ that indicate a process of transnational legal ordering (TLO) (2014: 23). Before outlining these dimensions, it is important to note that the process-approach to TLO emphasises the ‘production of legal norms and institutional forms in particular fields and their migration across borders, regardless of whether they address

transnational activities or purely national ones' (ibid: 6). It is consequently a 'methodological concept' that provides 'an analytic means for assessing transnationally induced change in a globalised world' (ibid: 7). In the Mongolian case, I am interested in the way that global economic norms, specifically political risk mitigation (i.e. regarding the stability of the political and legal environment), have effectively penetrated Mongolian law, policy-making, and state-society relations. Shaffer (ibid: 12) notes that transformations can equally be said to occur whether it is a *symbolic* legal change ('on the books in terms of constitutional, statutory or administrative law revisions, or the creation or restructuring of agencies and courts') or a change in 'legal and organisational *practice*' (emphasis added). Given that the 2014 "stability reforms" in the Mongolian mining regime were relatively recent, it is difficult to determine concrete practical effects, apart from the apparent redistribution of decision-making authority within the state, new roles in governance for the mining sector, and the institutionalisation of civil society. The long-term practical effects of these changes should be the subject of further study at a later stage. However, for the purposes of this thesis, the recognition of significant symbolic change and indications of limited practical effects for the state is sufficient within Shaffer's framework to constitute a process of transnational legal ordering.

As previously mentioned, Shaffer's analytic framework for TLO has five dimensions, which can be expressed in 'symbolic' and/or 'practical' modes. These are:

1. Changes in substantive law and practice;
2. Changes in the boundary between the state, the market, and other forms of social ordering;

3. Changes in the institutional architecture of the state;
4. Changes in professional expertise and expertise's role in governance; and
5. Changes in associational patterns, institutionalised through transnational accountability mechanisms with their accompanying normative frames (ibid: 23).

The following section will briefly situate the empirical findings of the previous three chapters within Shaffer's analytical framework in order to indicate the extent of an overall reordering process within the Mongolian state, before assessing its implications and concluding the thesis. Shaffer's framework of transnational legal ordering provides a nuanced analytical lens to identify multiple transnational processes and agents that can impact the state, both institutionally and normatively. As I explained in Chapter One, the notion of *transnational* legal ordering offers a way to move beyond the binaries (i.e. national/international, local/global, public/private, political/economic) which have shaped the majority of our language for law, capital, and the state. It also emphasises the way that the *laws of exchange* and '*acquisitive motives*' have ascended to a position of dominance in terms of organising social relations in market economies (Ebner, 2011: 21; Polanyi, 1944/2001: 71-72). As Ebner (2011: 22) puts it,

Contract serves as the decisive feature of this dis-embedded economic sphere. Indeed, the rules and regulations of exchange constitute the institutional order of the market process.

Stabilising Mongolia's Investment Environment as a Process of Transnational Legal Ordering

In the context of Mongolia's mining regime, I argue that a significant re-ordering shift is demonstrable since the 2012-2013

crisis of investment/investor confidence. Since this crisis, the power of investors in relation to the state has prevailed politically and institutionally. Consequently, institutions within the state that provide the necessary architecture for a favourable investment environment have been strengthened, while those that are seen to threaten investor interests (e.g. through the politicisation of mining investment) have been neutralised. Intra-state neutralisation was the subject of Chapter Four, in which various institutional loci of resistance, particularly legislative and deliberative organs of national and sub-national government, were curtailed. A major consequence of the new stability consensus within the state was the targeting of conflictual civil society organisations, which were increasingly perceived as agents of political risk and instability between 2004 and 2013. The criminalisation of a few environmental activists and the ‘mainstreaming’ of NGO engagement in “governance participation” has served to neutralise the de-stabilising effects of civil society on state-investor relations, as analysed in Chapter Five.

In the context of mining governance in Mongolia, we can see all five dimensions of a transnational legal ordering process at work in the 2014 reform process. The overall change in the direction of protecting investor rights and interests from national and local sources of political-legal instability was effected through a.) substantive legal reform affecting the balance of state-investor rights and responsibilities; b.) the redefinition of the appropriate boundary of state action in the market; c.) the strengthening of executive power at the expense of legislative/deliberate power within the state; d.) the privileging of technical expertise and “objective” decision-making in the governance of the mining sector; and e.) an institutionalised shift from conflictual to collaborative forms of association between the state, mining

companies, and civil society through tri-partite multi-stakeholder models of accountability. These five indicators of change correspond with each of the five dimensions of TLO outlined above. The following discussion will be structured upon each of these five dimensions in turn, for clarity, although naturally they reinforce each other in practice as will be noted when relevant. It makes sense to analyse these elements separately in order to show the way that state transformation cuts across the three relational axes of reordering that were analysed in Chapters Four and Five, connected to the configuration of central state power, central-local state relations, and state-society relations vis-à-vis environmental NGOs.

A. Substantive legal reform

One of the clearest conduits of the “stability norm” following the 2012-2013 crisis was substantive law reform. At the end of 2013, a new investment law was passed, and the 2006 Minerals Law was amended in 2014 to reflect the normative and regulatory goals of the 2014-2025 State Policy on the Minerals Sector. The new investment law replaced the Foreign Investment Law and the Strategic Entities Foreign Investment Law (SEFIL)⁷¹

⁷¹ SEFIL was passed in May 2012, asserting a stronger role for the state in relation to investment, particularly that coming from foreign state-owned SOEs. The Law introduced the concept of “strategic sectors”, which included banking, telecommunications and finance in addition to mining. The more controversial provisions of SEFIL included:

1. the requirement of Cabinet approval to purchase shares above 33% in a company in a strategic sector,
2. the requirement of Parliamentary approval for a.) state-owned investors to purchase a majority share in a strategic entity and b.) state-owned investors planning to invest more than 100 billion *tugriks* (approximately US \$71 million) (Edwards, 2013)
3. Cabinet approval for any transaction that had the possibility of controlling or diminishing the market price of mineral exports (Viverito and Hankin, 2014)
4. Disclosure of ‘ultimate beneficial shareholders’ (Hogan Lovells, 2013)

In addition to these provisions, the government was given a variety of new prerogatives regarding the appointment of boards of directors of strategic business entities (Viverito and Hankin, 2014)

(Buxbaum and Surenjav, 2014: 326). These laws had given Cabinet and Parliament fairly far-reaching rights of review regarding the purchase of shares, state-owned investments, large-scale transactions, and board appointments for 'strategic business entities.' Similarly, under SEFIL, investors in strategic sectors had unprecedented obligations to disclose shareholders and equity holdings.

In contrast, the 2013 Investment Law had the explicit purpose to 'protect the legal rights and interests of investors in the territory of Mongolia, to establish a common legislative guarantee for investment, to encourage investment, to stabilise the tax environment, to determine the rights and obligations of investors and the competences of a government body related to investment' (Article 1). Under the new investment law, anti-discrimination measures were introduced that guaranteed the equal treatment of foreign and domestic investors, and reduced restrictions on license trading. Crucially, it removed approval processes for foreign private investment (Hogan Lovells, 2013c: 1). Furthermore, the 2013 Investment Law introduced general rights to tax stabilisation and international arbitration. Previously, access to tax stabilisation and alternative dispute resolution were accessible only on a case-by-case basis, through the framework of investment agreement negotiations. Specific quorum measures also protect the new investment law to prevent legal change, particularly during election cycles. The new investment law is also protected by specific quorum measures to prevent legal change, particularly during election cycles; a two thirds Parliamentary majority is required to amend this specific law.

In early 2014, the government introduced the State Policy on the Minerals Sector (2014-2025), with the explicit goal of limiting the

state's role in the mining sector to that of regulation and management, instead of pursuing direct shares in mining projects as it had done since 2006. Substantive amendments to the 2006 Minerals Law to enhance 'private sector-led development' and to reduce the role of the state can be seen in the introduction of provisions for the state to trade its direct shares in mining projects for special royalties, depending on the outcome of negotiations with the license holder. The state formalised its 2014 policy commitment to stabilising the investment environment by offering general tax and non-tax incentives, and by reducing bureaucratic steps in gaining investment permissions and mining licenses (e.g. through the Invest Mongolia Agency). The 2014 amendments to the Minerals Law also clarify compensation duties for government authorities which use their powers to interrupt or delay mining licenses, particularly addressing the timing of compensation to licence-holders. According to revised Article 14.4, compensation from any government authority must be paid within one year, even when land has been set aside as a specially protected area by local authorities. In the latter case, if compensation has not been paid, exploration/exploitation may continue.

Several substantive changes to minerals legislation affect the rights and duties of local governments in relation to mining companies. For example, the 2014 amendments to the Minerals Law legislated *mandatory* Local Development Agreements between local governments and mining companies at the sub-national level, specifying a limited number of issues that could be addressed (environmental protection, infrastructure development, and employment). As discussed in Chapter Three, the balance of negotiating power was addressed in the amendments, in favour of the investing party. For example, regarding Local Development Agreements, the investor cannot be

compelled to contribute above a ‘voluntary’ level (Article 42.1). Furthermore, revisions to Article 15.1 increased the scope for reconnaissance for minerals exploration on land set aside for special purposes/protection by local governments (Minter Ellison, 2014). While local authorities still have the right – vis-à-vis the Land Law – to set land aside for local needs, the substance of this right is arguably undermined by the new provision in the Minerals Law that local governments compensate mining companies within one year should their decision conflict with a mining license. These new provisions and amendments provide a substantive legal basis for the protection of investment and investors’ rights in Mongolian law, shifting the balance away from the kind of “nationalist” prerogatives that undermined investor confidence between 2006 and 2012.

B. Changes in the boundary between the state and the market, and other forms of social ordering

The 2014 law and policy reform process introduced a host of new rights for investors, providing a juridical foundation for very political policy boundaries that articulated a reduced role for the state in relation to the market. The substantive changes to mining and investment legislation described in the section above were part of a broader political and policy shift to reorient the state towards investment as a stable regulator. As outlined in Chapter Three, the stated goals of the State Policy on the Minerals Sector (2014-2025) (hereafter “the Policy”) are to ‘strengthen private sector development’, ‘establish a stable investment environment’, and ‘strengthen the international competitiveness of the Mongolian mining industry’ (Otgochuluu, 2016: 68). As the Oxford Business Group put it, ‘the policy frames the state’s role as one of support and encouragement for the private sector, with its role limited to regulation and supervision’ (Oxford Business Group, 2015b). The Policy encourages a shift to a governance

culture that emphasises the importance of 'human capital, corporate governance, business ethics and rule of law' (Otgochuluu, 2016: 74). In this way, the Policy sets out a symbolic normative boundary of appropriate state behaviour in relation to the market.

Creating a market-friendly approach to mining governance was not simply a normative project; it underpinned wider market reform. In order to practically strengthen the marketisation of the economy and to limit state intervention – in the name of economic stability and competitiveness (Article 3.7.4 and 3.7.5) – the Policy proposed the establishment of a 'special purpose fund for mining sector income generated to the state budget,' meaning that the state's access to mining income would be institutionally limited, as opposed to ordinary state income. The World Bank has played a key role in advising the Ministry of Finance regarding the establishment of a sovereign wealth fund, as part of its broader agenda 'to build government and public support for more disciplined fiscal policy' (Robbins and Smith, 2014: 3). The Policy also discouraged direct state involvement in mining projects, recommending instead that SOEs be converted into public companies that run as commercial entities, guided by principles of corporate governance in the selection of management (Article 3.7.2 and 3.7.3). In particular, this can be seen in the partial privatisation and commercialisation of Erdenes Mongol LLC, which represents state interests in mining projects.

In 2015, a new state energy policy (2015-2016) was passed, with the core pillar being the privatisation and restructuring of state property (Woolley, 2015). One of the key principles for the reform was 'efficiency and productivity,' expressed as 'privatisation, market regulation and technological innovation' (ibid). In late 2015, the State Property Committee in charge of

regulating SOEs in Mongolia was dissolved, in order that SOEs could operate with a commercial mandate. Notably, in August 2016, an Investor Protection Committee was established 'to protect investors' rights and interests, promote cooperation within the legal framework of Mongolia, minimise foreseeable risks and facilitate settlement of disputes swiftly' (Amartuvshin, 2016). According to a statement published by LehmanLaw, an international law firm, this move was perceived as 'another positive step for Mongolia and for potential foreign investors... If the committee works as planned it could significantly reduce costs and mitigate risks for foreign investors in major projects in the country' (ibid).

Furthermore, the '100 Days of Reform' led by Cabinet that followed the promulgation of the new State Policy on the Minerals Sector included a range of market reforms not only related specifically to the minerals sector, but also enhancing Mongolia's overall reputation as a supportive destination for foreign investment (Hogan Lovells, 2014c). The liberalisation of capital markets, including securities, transfer of pledges, and registration reforms affirmed the priority of protecting foreign capital interests, stimulating trade, and expanding financing options for investors. For example, Mongolia's capital markets were made more competitive internationally through the adoption of international standards related to financial markets and securities. In June 2014, the Financial Regulatory Commission signed the International Organization of Securities Commissions' Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information. This significantly increased the competitiveness of Mongolia's capital markets internationally through standardisation (Buxbaum and Surenjav, 2015: 325).

Moreover, it is worth noting that the investment crisis in 2012-2013 and the state's consequent difficulty in regaining the confidence of investors prompted a major debt crisis, culminating in a structural adjustment for the state, facilitated by the IMF and China. In late 2016, Mongolia's overall debt burden was estimated at approximately USD 23.5 billion (200% of GDP), with government debt at USD 8.4 billion (70% of GDP) (Hornby, 2016). While commodity prices increased (as in the case of coal) or at least stabilised (as in the case of copper) in 2016 (Benard, 2016), it was not enough to balance the trade deficit in addition to debt repayments. Facing the first major debt repayments on its bonds and swap agreements in 2017, the Mongolian government was on the brink of default. In January 2017, after a brief negotiation, the IMF coordinated approximately USD 5.5 billion worth of debt financing for the Mongolian government to prevent default, which included an extension for Mongolia's currency swap agreement with China, which had been set to expire in August 2017 (Edwards, 2017).⁷²

A key consequence of this structural adjustment, which has its origins in the investment crisis of 2012-2013, has been the strengthening of fiscal and monetary institutions (i.e., the Central Bank) and the creation of new limits on government spending. The introduction of ceilings in government spending, which exist *prior* to the approval of the national budget by Parliament (e.g. Fiscal Stability Law), is an important 'shift of functions'

⁷² The increasing role of China in relation to Mongolia's debt burden and currency stability is part of the development of a 'comprehensive strategic partnership' between the two states (Turmunkh, 2016). Mongolia has strategic importance for China's Silk Road Economic Belt and Maritime Silk Road ("One Belt, One Road") project, which aims to expand and integration economic regionalism in Eastern, Southeastern and Central Asia, as well as Eurasia through development finance and infrastructural expansion for regional trade networks 'connecting China with neighbouring countries and regions' (Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform, Article 26, Section VII, cited in Tao 2015).

(Anderson, 2005: 21) from the political to the economic, as the Central Bank gains institutional primacy in relation to the budget. While Parliament still approves the budget, its decision-making is structured by ‘market principles’ (ibid), eschewing redistributionist or otherwise “political” approaches to resource allocation (ibid).

C. Changes in the institutional architecture of the state

One of the major aspects of change in the state following the 2012-2013 investment crisis was the strengthening of executive power in relation to the mining sector. As analysed in Chapter Four, Parliament had played a major role in “destabilising” the investment environment by regularly amending the minerals law or passing new legislation, such as the Strategic Entities Foreign Investment Law (2012) and the Law on the Prohibition of Mineral Exploration and Mining Operations at Headwaters of Rivers, Protected Zones of Water Reservoirs and Forested Areas (2009). Members of Parliament had also initiated the renegotiation of the Oyu Tolgoi Investment Agreement (OTIA), signalling insecurity of contract and tenure for investors. The 2014 stability reforms recalibrated the balance of power between different organs of the state in relation to the mining sector, by limiting Parliament’s power to revise new pro-investment legislation (i.e., the 2013 Investment Law) and introduce new bills that could affect the minerals sector. In the case of the Investment Law, it was as straightforward as introducing a higher quorum (two-thirds majority) for that particular law.

However, with a view to more generally preventing swift legal change, the 2014 amendments to the Minerals Law legislated the formation of the Minerals Policy Council (MPC), a multi-stakeholder body working under the auspices of the Ministry of

Mining. The MPC was supposed to review any legal or policy changes to the minerals sector prior to parliamentary debate, allowing investor and mining association representatives to have advisory input in the mining governance regime. Follow-up communications with the original Vice President of the MPC (N. Algaa, President of the Mongolia National Mining Association) confirmed that the council has been convened three times since it was officially instituted in 2015, to review draft amendments (personal communication, February 2017). While he noted that the new government (as of June 2016) has not been paying much attention to the council,

The Prime Minister's cabinet has established a new council to deal with the claims and appeals of investors. In general, the government is trying its best to improve the relationship with foreign investors (ibid).

The creation of a similar council under the Cabinet in addition to the MPC (attached to the Ministry of Mining) indicates the ongoing priority of the government to protect and promote the interests of foreign investors, despite the change in political power resulting from the Parliamentary election in June 2016.

In a similar way, Local Development Agreements were designed to function as hybridised governing spaces where investors and local authorities can negotiate and find common ground about the role of mining companies in local development. While there is a public-private element to these new forms of deliberation at the central and sub-national levels of government, they represent an architectural transformation within the state, whereby investors and mining companies have a formalised role in governance as “partners” and “collaborators” with the executive office of local governments in relation to specific issues. At the sub-national

level, the nomination of district and provincial governors as the signatories of local development agreements further consolidates the proactive relationship between executive authority and mining.

Additionally, pro-investment spaces of executive power have been strengthened in the central government, specifically the Ministry of Mining, the Ministry of Finance, and the Mineral Resources Authority (MRAM). The decision-making powers of the Ministry of Mining and the Mineral Resources Authority were expanded, and two new agencies were formed: the Invest Mongolia Agency (IMA), and the National Geological Office. The IMA, as the implementation agency of the Investment Law, is in charge of the approval process for investments (IMA, 2014: 60) and is directly supervised by the Prime Minister's cabinet, thus effectively streamlining decision-making into a one-step process at most.

D. Enhancement of professional expertise and its role in governance

In line with the new emphasis on easing investment restrictions and separating mining governance from nationalist politics, the 2014 reforms promoted a stronger role for technical and professional expertise in governance. For example, Article 2.1.1 of the State Policy on the Minerals Sector (2014-2025) stipulated that one of its principles with regard to the minerals sector is objective decision-making:

to base any decision with respect to the legal and tax environment on the results of research and analysis, to ensure long term sustainability of the policy in minerals sector and to ensure that the legal interests of participants are not negatively affected.

In line with this principle and ‘within the framework of improving the legal environment for the minerals sector’ (Article 3.1), the State Policy commits to promoting ‘international initiatives for transparent and responsible mining and social and economic impact assessment’ (3.1.7). It also supports the professionalization of research in the minerals sector (i.e. through teams of qualified engineers) (3.1.8), and a ‘shift to international standards for the evaluation of minerals deposits.’ In October 2014, Mongolia became a member of the Committee for Mineral Reserves International Reporting Standards (CRIRSCO). While there is nothing intrinsically wrong with improving factual accuracy with the collection of geological data collection, the intentions behind such an exercise are the critical factor. In CRIRSCO’s case, I argue that it is yet another mechanism to enable further marketisation of the economy, by furthering the rational (quantitative) basis for exchange (see Ebner, 2011).

For example, the rationale behind CRIRSCO is to strengthen and develop communication of the ‘risks associated with investment effectively and transparently in order to earn the level of trust necessary to underpin its activities’ (CRIRSCO, 2017). CRIRSCO reports are based on mineral reserve estimates and exploration progress, in order to enhance ‘market-related and financial investment’ (ibid) through standardisation. In line with these developments, the State Policy also calls for the professionalization of a minerals board – comprised of ‘qualified experts’ (3.1.11) – to facilitate and enforce international reporting standards. In January 2014, the Mongolian Professional Institute of Geosciences and Mining was established as a non-governmental organisation. Finally, in line with the 2013 Investment Law’s provision of international arbitration for investors, the State Policy recognises the need for the development of a ‘dispute resolution system that is consistent

with international standards' (3.1.12), requiring the training of 'qualified lawyers, economists, experts and arbiters.'

E. Change in associational patterns instituted through transnational mechanisms of accountability with accompanying normative frames

The 2014 stabilisation reforms effectively repositioned political issues as “economic,” “legal,” or “social” within the governance regime to prevent politicised discourse or activities from disrupting the stability of the investment environment. The institutionalisation of distance between spaces of representative democracy and mining governance on the one hand, and the legitimisation of multi-stakeholder politics as a collaborative alternative to politically risky social conflict on the other, are both symptomatic of a deeper process of political neutralisation to protect the market. For example, formerly political aspects of mining investment, which involved democratic processes of deliberation and review, have been re-determined as issues of economic administration, and institutionally relocated in executive agencies and ministries, outside formal political control. The strengthening of executive power in relation to investment and the creation of hybridised spaces of governance *within* the Ministry of Mining and local governments reinforces the deepening alignment between state and capital investment interests. Furthermore, national political conflict – characterised by systematic processes of election and representation, debates around the boundaries of the public interest, and infused with the language of national political community – has been transferred to alternative stakeholder-based forums which are issue-, identity-, and interest-based in their orientation. These “governance participation” alternatives are based on direct negotiating power, akin to a commercial transaction of

stakeholders, in which all parties have nominally equal value based on their private interests.

The depoliticising impetus behind the 2014 reform effort, and the emphasis on technical, objective, and the associated emphasis on professional decision-making, has also affected the relationship between civil society organisations, mining companies, and the state. As analysed in Chapter Five, one of the targets of the 2014 “stability consensus” was to place stronger limits on the role of environmental NGOs and rural activism in relation to the mining sector. In part, the state has aided the institutionalisation of NGOs through criminalising “radical” movements on the one hand, and through offering a legitimate place for NGOs to have influence upon the mining governance regime vis-à-vis the Mongolian Environmental Civil Council on the other. The shift in role from activism to expertise for environmental civil society is important, as it signals the relative strengthening of NGOs as governance *partners* with the state and the private sector within a pro-extractive framework. Furthermore, the legitimisation of transparency-based, multi-stakeholder models of accountability at the national and sub-national levels, as part of a “responsible mining” discourse, breaks new ground in terms of *who* represents the public interest: the government or NGOs? The emphasis on stakeholding, negotiation, and collaboration for mutual benefits has shifted the antagonistic encounters between competing interest groups to new ‘multi-stakeholder’ fora, ushering in market-friendly representation and rule-making around company-“community” conflicts.

F. Summary

The brief recapitulation above highlights key aspects of the 2014 reform process to regain investment and investor confidence in Mongolia’s minerals sector. The relationship between state and

capital grounds the five aspects of TLO, indicated along three axes of institutional reordering studied in this thesis. Within this broader context, a boundary-shifting and redrawing process has occurred that enables the Mongolian state to suppress and even evade the social conflict which had destabilised the political and legal conditions for investment between 2006 and 2013. By closing avenues of risk and establishing a new hierarchy of priorities, while still permitting limited outlets for contestation through institutionalised forms of civil society, the Mongolian state has consolidated a positive overall orientation towards transnational capital. Fundamentally, this positive orientation has been made relatively secure through legal and financial mechanisms that either incentivise or enforce the cooperation of national and civil institutional actors which could otherwise present a challenge. When situated within Shaffer's framework of transnational legal ordering (TLO), the diverse ways in which the norm of legal and political stability (for investors) has infused law, state institutions, state-market relations, and civil society becomes apparent. In the previous three chapters, I analysed the stabilisation process along three key axes (within the central state, between central and local governments, and state-society relations). However, in the next section I will focus on the overall effects of this case of new constitutionalism on the democratic state of Mongolia.

Prior to doing this, though, it is timely to ask the counterfactual question. A sceptical reader might be unconvinced that a process of deep transformation was catalysed by the crisis of investment/investor confidence in 2012 and 2013. Conceivably, a sceptic might not see the underlying connection between the legal and political reforms targeting diverse actors and institutions undertaken since 2014. My response to the sceptic would be to ask the following: if there had been no decline in foreign direct

investment and a “crisis” of investor confidence associated with it in 2012 and 2013, would the post-2014 governance configuration be present? While there are certainly domestic factors at play in affecting the responsiveness of the government to investor interests, removing the ‘transnational story’ (Shaffer, 2014: 2) would arguably produce a very different outcome for Mongolia’s mining regime. Without an externally imposed crisis, there would have been no incentive for such stringent reform of national law and politics. Why would political elites such as members of Parliament voluntarily support legislation that reduces parliamentary powers in relation to the mining sector? Why would a cross-party consensus have emerged so suddenly (in the wake of falling investment), when many politicians and parties were previously known for their anti-FDI platforms?⁷³ The sudden recognition that ‘we are the cause of the economic crisis’ (Prime Minister Saikhanbileg quoted in Mongolian Economic Journal, 2014) does not reflect an organic process of change, but rather a pragmatic response to a new reality: ‘These hard times are lessons. The biggest lesson [is that] we need investment, we need to support business activities’ (Director of Strategic Policy and Planning, Ministry of Mining, author interview).

⁷³ After foreign investment continued to spiral downwards in 2014, Prime Minister N. Altankhuyag was ousted by a parliamentary vote of no-confidence on the 5th of November. By the end of November, a new Prime Minister, C. Saikhanbileg, had been appointed from the ranks of the Democratic Party and formed a ‘super coalition’ (Hornby, 2014) with the opposition (the Mongolian People’s Party), the Justice Coalition, and the Civil-Will Green Party to regain foreign investment and prevent further economic crisis. With foreign investment having dropped from USD 4.45 billion in 2012 to \$508 million in 2014 (Kohn, 2015), a multi-party consensus emerged across the political spectrum to remove barriers for investors and to make evident Mongolia’s commitment to supporting private-sector led development of its minerals.

Assessing State Transformation after the FDI Crisis: Implications for Democratic Politics, the Rule of Law, and National Sovereignty

It would be inaccurate to suggest a “hollowing out” of the state or even an overall weakening in the Mongolian case, given the evident expansion of pro-market legality and the increase of executive power in relation to the minerals sector, alongside the state’s role in re-engaging investors. However, the cost of insulating the mining sector from political and legal risk is also borne by certain components of the state; in this case, democratic institutions and norms. In this section, I will examine the redrawing of the boundary between the “political” and the “economic” within Mongolia’s mining regime and examine the risks that such a redrawing pose for the future of democratic politics, the function of the rule of law and Mongolia’s relative sovereignty as a nation-state.

“Who Cares About Politics?” Setting out the Democratic Significance of the New Political-Economic Boundary in Mongolia’s Mining Regime

The crisis of investment (confidence) led to the deepening separation between the political and the economic spheres within Mongolia’s market democracy. In general, the liberal democratic model can be said to be premised upon the distinction between two spheres of power: the economic and the political (Wood, 1995: 234). The former is distinguished from the latter in the mode of its power relations as ‘not dependent on juridical or political privilege’ (ibid) but rather dependent on ‘the power of appropriation, exploitation and distribution.’ In Polanyi’s words (1944/2001: 71), ‘a market economy is an economic system controlled, regulated, and directed by market prices.’ Economic power in a market democracy is distinguished by its relative *freedom from* the direct control of the state. Although the state

may attempt to shape market activities through regulation, this is not the same as state control. Wood (1995: 235) puts it this way:

As with most kinds of freedom, there may have to be certain restrictions or regulations on it to maintain social order; but it is still a kind of freedom.

Consistent with this observation, investors in Mongolia's mining sector were largely not contesting the state's right to regulate the sector per se, but rather its substance and manner in which regulation was imposed. It was the state's interference in the market – by assuming direct stakes in mining projects (designating them as “nationally strategic” as opposed to simply “valuable”) and imposition of some controls – which was the root cause of investor-state conflict. These political behaviours within the market were deemed inappropriate in the economic sphere, particularly the nationalist use of law to legally legitimise the state's behaviour. Consequently, the 2014 reforms were devised to rebuild investor confidence. Not surprisingly, the way to achieve this goal in a market economy is to demarcate the boundary of appropriate state behaviour in relation to the economic sphere in general. This demarcation effort has two key implications for democracy, in practice and as a normative ideal.

Practically speaking, the new consensus to protect the minerals market from national “instability” means that fewer legal and policy issues are available for national contestation or review, either by transferring decision-making power to different institutions or by creating strong financial incentives and/or legal barriers to keep them from becoming “politicised.” These practical measures have already been explored in some depth in previous chapters, for instance, the “locking in” of local governments' support for mining projects through financial incentives and new legal institutions (i.e., LDAs). Limiting local

budgets, whilst providing the opportunity for local governments to receive more from the state through national budgetary allocation if they support mining licenses in their jurisdictions, constitutes another incentive structure. The new possibility to generate capital independently of the central state through LDAs and local fee payments from mining companies reinforces this incentive structure. Regarding negative incentives, local governments are now burdened with new time pressure to compensate mining companies *within a year* should their decision to protect land conflict with mining licenses, localising financial pressure to effectively prevent such measures. As the Head of the Mining Division at MRAM put it, local governments need to have ‘a good reason’ to reject mining licenses, based on objective factors (author interview). In this way, the more fundamental question of “do we want mining in our districts and regions?” shifts to the more instrumental issue of “how can we benefit the most from mining in our districts and regions?” By raising the requirements for legitimate restrictions on mining, the baseline moves from questions of “if” to questions of “how,” constituting a closure of political space as well as the possibilities of alternative development pathways (Schneiderman, 2013; Anderson, 2005: 147).

While I have used the case of local governments here, similar examples abound in the central state regarding the use of a combination of incentives and negative pressure to limit the state’s “political” involvement in the mining sector. In a sense, it no longer seems that popular to be a populist. The legitimacy of executive power in the state has grown since the FDI crisis, as public frustration mounted over the state’s seeming inability to effectively manage and administer the economy. As a prominent civic advocate explained (author interview), people seem to be ‘moving away from the essential things that we chose [after

communism], such as democracy and human rights.’ In particular, he warned that ‘young people are forgetting the danger of authoritarianism,’ citing new studies that give evidence of this worrying trend. For example, the Asian Barometer conducted a survey to measure the extent of ‘detachment from authoritarianism’ between 2001 and 2016 (Asian Barometer, 2016), discovering that more than 64% of Mongolian citizens now support the removal of Parliament ‘in favour of rule by a strong leader’ (ibid), as opposed to 40% in 2001.⁷⁴

The growing public cynicism about politics thus dovetailed with criticism from investors and the mining industry about the government’s “unprofessional decision-making”. This reinforced the necessity of redistributing the state’s power in the mining sector towards investment promotion, legal implementation and regulation, licensing procedures, and administrative management, as opposed to the state playing a direct role as an owner or shareholder in mining projects. Significantly for democracy, parliamentary power has been constrained by the shift of most decision-making capacities to pro-extractive ministries and agencies, which have opened advisory and consultation spaces to investors in order to provide input on general policy-making trajectories (e.g. the Minerals Policy Council under the Ministry of Mining).

The shift of state power in relation to the country’s most strategic economic sector has normative significance, apart from the practical implications of making the legal environment more investor-friendly. Decision-making and norm-generating power has shifted from legislative, representative and deliberative spaces in the state, one hand, to executive, appointed and

⁷⁴ During my fieldwork, cynicism about Parliament and politicians was present in informal conversations, particularly with young people.

technocratic spaces on the other. By targeting representative and legislative spaces as being too “political” with regard to the country’s most significant economic sector, the 2014 reforms communicate an implicit message about the legitimacy and value of politics in democracy. The preservation of investor confidence as a new baseline for legitimate politics homogenises the scope of policy options and interventions available for the state, privileging the freedom of the market as opposed to the freedom of the national *demos*. As Polanyi (1944/2011: 60) warned, the creation of an economic sphere regulated by export competition and price relegates society to the position of ‘adjunct’ to the market, where the security and stability of market relations take primary position. To put it simply, the scope of national democracy has been limited in Mongolia in relation to market-protecting preferences of transnational capitalists.

As Schneiderman (2013: 165) argues, the loss of openness has significant negative implications for democratic political life, because it signals the almost permanent closure of alternatives. While it is possible and even necessary for closure to occur within democratic polities as a sign of self-rule – ‘not everything can be contested all of the time’ (ibid) – the insulating impetus of transnational legality seeks to *permanently* exclude political processes from influencing the global market. Schneiderman argues convincingly that the inherent value of democracy, with its ideals of ‘collective self-revisability’ (ibid), is its systemic openness to change (ibid: 165, 15). In this sense, the underlying undemocratic issue with the transnational legality associated with economic globalisation is that it seeks to (permanently) place itself beyond the reach of the democratic domain.

The affirmation of pluralism (i.e. diverse conceptions of “the good”), particularly when it comes to significant areas of public

law and policy-making, can be understood as a core norm of democracy; political processes provide a *unified* system to express the *diverse* interests and needs of “the people.” This unity-diversity dynamic is a critical part of democratised collective life; the elements of unity (e.g. through universal categories such as citizenship) which create a “we” can then be nuanced by the reality that “we” do not all share the same interests, perspectives or values. While not wishing to ‘romanticise politics’ (Spicer, 2010: 51), the value of values-pluralism contained in democracy at its most basic is precisely that the reality of social complexity acts as an antidote to coercive attempts by states to *totalise* their subjects into one objective unit. Furthermore, Spicer (2010: 62) makes the argument that an instrumental approach to public administration which seeks to ‘downplay if not actually deny’ the political character of governance can ‘erode our sense of moral responsibility’ (ibid) to the “demos” (i.e., the people). As Spicer (ibid: 64) puts it,

The rhetoric of instrumental rationalism in public administration... hides moral choices from the view of administrators by focusing their attention single-mindedly on technical questions about how to best accomplish some pre-defined set of measurable goals, missions, or ends... it can foster the idea that those whom the administrator must deal with – citizens, politicians, and other administrators – are not human beings as such but are mere objects to be manipulated at will.

Returning to the Mongolian case, the idea that citizens and their representatives were incapable of contributing to effective policy because they lacked sufficient knowledge was a common theme among “stability” reformers. As one of the main contributors to

the State Policy on the Minerals Sector (2014-2025) put it in a recent policy brief (Otgochuluu, 2016: 2):

Ultimately, only educated voters can assist in creating a political environment that enables the formulation of government policy geared towards effective regulation and sustainable development. To do this, policy-makers must acknowledge the degree to which the country's socialist past and semi-nomadic traditions shape policy debates, and adopt a communication strategy that allows for a constructive national discussion of the role of mining in Mongolia's new economy.

In my interviews with senior government personnel, semi-nomadic culture was regularly associated with a lack of discipline and consistency, not helped by Mongolia's socialist heritage; citizens allegedly have high expectations for the state to provide welfare, services and generally redistribute mineral rents on a universal basis. As the quote above suggests, the perceived benefit of an educated mass was that the public will consequently not make *unreasonable* economic demands of the state (i.e., by agitating for direct redistribution), having appropriate understanding of the challenges of navigating the boom and bust cycles of commodity markets. This expert emphasis on the making of a "reasonable" (i.e., market-friendly) public reinforces the dominance of economic values in mining governance, such as avoiding government overspending during "boom" cycles in commodity markets and preventing legislative change to support foreign investment flows. The instrumental, rationalistic thinking at work in state administration denies its very political nature, augmented by the fact that its proponents work mainly in the opacity of executive institutions. Consequently, this technocratic, anti-political discourse remains institutionally protected from being challenged by other perspectives and rationalities. Thus,

there is strong reason to be wary of the lure of 'anti-politics; it originates in a 'technological "style of thought" that promises to "rescue mankind from the lack of certainty and the glut of compromises in politics"' (Spicer, 2010: 68, citing Crick, 1962/1993: 92).

Thus, when the political sphere experiences closure of any significant degree (e.g. in relation to mining and resource distribution in Mongolia's case), we can logically argue that this amounts to a substantive 'undoing' (Brown, 2015) or, at the very least, a *de facto* reconstitution of democracy. This point was expressed cogently in an interview with a prominent NGO advocate as the cost of preferring expertise and professionalism over politics in decision-making. While careful not to idealise politicians in Mongolia, this interviewee recognised the distinction between a critique of political leadership and the exclusion of *politics* and *political institutions* (e.g. Parliament) in relation to the mining sector. By excluding politics, pro-stability lobbyists and reformers did not adequately recognise the democratic values at risk, apart from national control over strategic resources. Mongolian politicians now take pride in describing themselves as 'so pragmatic' but he noted the lack of political *principles*: 'they [political parties] are divided in terms of business groups, without ideology.' This observation has some merit when one looks at the policy platforms of the two major political parties following the FDI crisis; they both supported, and continue to support, private-sector-led development and the promotion of foreign investment in the mining sector. The contraction of the political spectrum across political parties reinforces the stability of mining law and policy across election cycles, which were formerly a source of anxiety for investors. This can be clearly seen in the way that the 2016 elections did not lead to the reform of the 2014 "stability consensus," even though the

Mongolian People's Party, opposition to the Democratic Party (the main political force behind the 2014 reforms), won the election. Thus, in the Mongolian case, rather than complementing the representative system by incorporating authentic avenues of public participation into the heart of the mining regime, the "stability consensus" embodied in the 2014 reforms shifted the balance of state power in the opposite direction, strengthening its 'bureaucratic, administrative and coercive apparatuses' (Held, 2006: 196). Under the new regime, it is no longer legitimate to contest an export-oriented, foreign-investor-friendly mining sector, or to encourage direct state intervention in the minerals market beyond the facilitation of extraction by providing a "reasonable" jurisdiction for investment to occur. This shift marks a normative closure for democratic politics, by homogenising a formerly more heterogeneous political debate, and by limiting the scope of redistributive intervention by the state.

Before concluding this section, it is important to mention the extent to which the strategies of organised civil society might ameliorate the anti-politics of the mining regime. Unfortunately, so far, the increasingly institutionalised nature of NGOs, as examined in Chapter Five, has left the new political-economic boundary relatively uncontested. Civic actors and institutions, like the MECC, structured as they are by the boundaries of foreign donor and state funding, largely concentrate on aspects of the *process* of extractive development, such as revenue transparency, environmental impact assessments, monitoring mining projects, and representing "community" interests in LDAs. While these are important issues, NGO advocacy does not challenge the pro-investment orientation of the state or the anti-political direction of state mining policy. In this sense, the current organisation of civil society does not fundamentally enhance the 'accountability

of power' (Anderson, 2005: 147) but rather contributes to making the new order hegemonic.

NGOs can inadvertently reproduce distrust of national politics by presenting themselves as a more trustworthy alternative to national political representation through multi-stakeholder politics. Despite the subtlety of its introduction in Mongolia's mining regime, stake-holding offers a new orientation to political representation and participation. On one hand, it opens up the possibility of wider participation and inclusion of different interest groups in the negotiation of a particular issue based on the idea of having a "stake" in it. On the other hand, stakeholder politics is yet another example of arena-shifting in Mongolia's mining regime, where conflict gets relegated to specifically "non-political" forums designed to contain and resolve it. Particularly at the sub-national level, NGOs have gained prominence as governing institutions for "participatory" initiatives, like local development agreements and environmental co-monitoring with mining companies. However, it is difficult to assess the benefit(s) of participation, particularly when the initiatives are offered by the private sector, who have their own "business case" reasons to engage. Rather than reflecting the organic, grassroots politics that participatory governance is supposed to generate, NGOs can be complicit in furthering "governance participation," a 'perverted' (Santos and Avritzer, 2007: lxix) form of popular engagement wherein participation is bureaucratised and professionalised, without genuine democratic scope (i.e. that which offers the possibility of systemic change) (Schneiderman, 2013: 165).

For example, there is a great deal of opacity about the actual *process* by which NGOs receive a community mandate for representation in local development agreements. NGO activists can also become governance technicians, as 'a matter of

instructing people in the proper practice of politics' (Li, 2007: 25), even under the seemingly progressive framework of participation which connotes a 'people-centred' approach (White, 1996: 6). The role of NGOs as agents of participation is particularly ambivalent when they are institutionally circumscribed by the state to pursue a limited range of activities in *partnership* with state organisations and mining companies. Participation can become a way to mobilise and organise citizens in "constructive" directions, rather than reflecting a genuine democratic process that is attentive and open to local perspectives. As White (ibid) incisively puts it, 'sharing through participation does not necessarily mean sharing in power.' Thus, to conclude, the programmatic, project-based and stakeholder-oriented approach of current civil society efforts in relation to mining render them largely ineffective against the structural reorientation of the state towards foreign capital in Mongolia. Furthermore, NGOs can also act as a potential force for deepening the anti-political trajectory of mining governance. Of course, the hegemony of the stability order is not immune to challenge, but a strong disciplinary incentive structure protects the mining regime legally, politically, and socially.

A New Rule for the Rule of Law? Stability as the New Grundnorm for Mining Law and Policy

The role of law has been alluded to as an instrument of constraint upon the scope of democratic politics in relation to the mining regime, but the significance of this point merits further analysis. The new anti-politics described in the previous section, alongside the expansion of what is considered "economic" as opposed to political (for national democratic purposes), has occurred through legal development. Legal solutions to investor confidence have also been the focus of central policy-making for the mining sector. The centrality of law to the 2014 "stability" reforms reflects an assumption about the law's relationship with politics,

namely that it is a relationship of constraint. Using law to constrain politics and to enable ‘an economic sphere with its own power relations not dependent on juridical or political privilege’ (Wood, 1995: 234) remains the function *par excellence* of legal liberalism, the legal ideology that accompanies liberal democracy and economics. In this ideology, the rule of law mediates the boundary between the political and the economic, as the juridical guarantor for the existence of an economic sphere, based on the supposedly rational exchange of price value, against the political sphere, based on irrational power and interest (May, 2014: 68).

While we know that the division between the political and the economic is not so clear in practice, the idea of the rule of law as securing space for the market to operate has major ideological purchase in the governance of the global economy (May, 2014: 63). As Wood (1995: 30) puts it,

Absolute private property, the contractual relation that binds producer to appropriator, the process of commodity exchange – all these require the legal forms, the coercive apparatus, the policing functions of the state... the differentiation of the economic sphere means simply that the economy has its own juridical and political forms whose purpose is purely ‘economic.’

The rule of law, from a market standpoint, is not political, even though it is enforced by the state, because it does not *interfere* with the market or impose non-economic imperatives upon it. In fact, markets are dependent upon a certain variety of the rule of law for their very existence. As Ebner (2011: 22) puts it,

The rise of the market as a set of hegemonic institutions which shape the modern exchange economy coincides with the rule of law, which implies a

reduction of social relations to the regulation of property and contract.

The rule of law, in this view, is supposed to protect the market from any political and legal influences that are not economic in purpose. Thus, in this view, the rule of law is not actually about protecting the market from the state *per se*, but from particular forms of “illegitimate” state behaviour in relation to the market; the market would not actually exist if it were not juridically protected and enabled by the state (Polanyi, 1944/2001). As Wood (ibid: 31) astutely concludes, ‘the differentiation of the economic and the political in capitalism is, more precisely, a differentiation of political functions themselves and their separate allocation to the private economic sphere and the public sphere of the state.’

In relation to Mongolia’s mining regime, one of the major dimensions of the purported crisis of investor confidence was growing doubt about the state’s commitment to the rule of law. However, this allegation stems from an emergent ideology of the rule of law in a globalised economy (Jayasuriya, 2001), which implies the *active positive* protection of private property rights by the state. The rule of law, at its most basic, could also be understood as the *prevention* of arbitrary exercises of power by the state. Within national democratic states, this used to be the general framework for the rule of law – the prevention of arbitrariness by the state against its own citizens. On the basis of this more minimalist definition of the rule of law, the state should be under no obligation to formulate investment-enabling laws and policies, particularly for *foreign* investors. In fact, the law could be changed to permit direct state involvement in the economy and, as long as the conditions are met regarding universal application, due process, and non-arbitrariness, this type of state action could fit the criteria for the rule of law.

However, in a context where states participate in a *global* market, the rule of law takes on a whole new meaning, regulating the state's interaction with economic actors outside the boundaries of its own jurisdiction. As Jayasuriya puts it (ibid: 448),

At the heart, then, of the transformation of the [national] sovereign model is the separation of the territorial state and law.

A major implication of the “stability consensus” in Mongolia is that it imposes a particular definition of legitimate legal action by the state in relation to the market. Not only were investor rights and preferences protected and promoted, but the public rights of the state to legislate in its own interest were curtailed. ‘Thresholds of legitimate behaviour’ (Schneiderman, 2013: 35) based on the stability of the legal environment and principles of non-intervention in the minerals market were actually well above the minimum criteria for the recognition of the rule of law by a *national* state. However, as I have been arguing throughout this thesis, Mongolia's dependence on foreign capital has made the state vulnerable to processes of ‘global’ state transformation.

Furthermore, the legal dimension of Mongolia's extractive reordering is a fundamental part of what renders it ‘constitution-like’:

It holds separate the political and economic to ensure that the economic remains uncontaminated by the political, and the rule of law stands between them: markets are facilitated by the legal structures of property, contract and other laws... In this sense, the pre-commitment to the rule of law limits and shapes any subsequent reformist dynamic (May, 2014b: 153).

Where previously the Mongolian government promoted legal change in relation to the mining sector whilst maintaining a

national conception of the rule of law, the post-2014 reforms implicitly presume the *stability* of the legal environment as new criterion for the rule of law. In this sense, a version of the rule of law that privileges the stability of the investment environment functions as the new basic norm upon which the new extractive order rests. Citing Kelsen (1923/1998: 13), May (2014: 65) argues that the sign of a basic norm, or *grundnorm*, is that it exists as “the highest rule of law creation, establishing the unity of the entire system, [and] is indeed on hand for the issuance of other legal norms, but it must itself be assumed to be *presupposed* as a legal norm and not *issued* in accordance with other legal norms.” The stability of the investment environment has never been legislated, but it is the *a priori* intent, purpose, and normative rationale for governance post-2014. This is a remarkable ‘hidden’ (ibid: 69) constitutional development, in the sense that a shift in the basic governing norm reflects the fact that a fundamental reordering process has taken place. As May (ibid) argues, citing Gill (1998: 25, 30), what is actually ‘hidden’ is not simply the emergence of a new normative basis for governance, but ‘the manner in which powerful (class) interests shape the forms of political economic relations that *can* be established.’

Vulnerability in the Global Economy: Lessons from Mongolia

Is Mongolia’s experience of global economic integration simply a “perfect storm” of factors that are particular to this case, or are there some broader comparative insights present? More simply, what is the value of a single, relatively obscure case for the study of the political and legal reordering that accompanies global economic integration? I argue that the value of the Mongolian case lies in its extremity, as an example of the level of impact that foreign direct investment can have as a lever against national legal and political institutions, and of the extent to which the logic

of foreign investment protection can penetrate capital-importing states. The fundamental dependency between state and capital is revealed in contexts where the state *imports* capital; the limited room for manoeuvre highlights the centrality of capital-access to the range of policy options available for the state to regulate the economy. An “extreme” case study does not exaggerate the transformative potential of global economic integration for the state; rather, it reveals the forceful capacity of transnational capital in relation to the national state.

In the Mongolian case, we can see the real tension emerge between a national democracy and its increasingly globalised economy partly because Mongolia does not exert strong capital influence itself. It is thus a striking example of the democratic vulnerabilities involved in export-oriented, foreign investment-dependent development strategies. Protecting investment from political and legal risk may threaten a number of important dimensions of national life, particularly the promises of popular power, representation, pluralism, and (relative) sovereignty. Thus, to quote Ferguson (1990: 257-258), a more extreme case study can act ‘as a clarification, just as the addition by a computer of “extreme” colours to a remote scanning image does not distort but “enhances” the photograph by improving the visibility of the phenomena we are interested in.’

While the effects of global economic integration might be extreme in the Mongolian case, it is not because the Mongolian state resisted the marketisation, privatisation or liberalisation of the national economy. The Mongolian state, since its post-socialist transition, has been very committed to market-based economic development and, as explored in Chapter Three, boasted one of the most liberal frameworks for mining investment by the late 1990s. Thus, Mongolia’s “perfect storm” occurred *after* the state

had subscribed to Washington Consensus in the 1990s and undergone “structural adjustment” to enable the creation of a market space of economic exchange that was institutionally distinguished from the state. In this sense, the extremity of the Mongolian case was not caused by its lack of enthusiasm for global market integration. Even during the “resource nationalist” period of mining governance, the government was not radically *anti-market* or *anti-foreign investment* (see also Hatcher, 2014). The renegotiation of the mining regime (2006-2012) was an attempt to redraw the boundary in the state-market relationship between the political and the economic, but did not mark a radical break with the trajectory of the neoliberal state as an entity that supports such a division (Harvey, 2005). In light of this, the harshness with which the recalibrating efforts of the government have been reversed and nationalist sentiments expelled from governance discourse is testament of the coercive potential of global economic integration for small states heavily dependent on foreign investment.

Conclusion

It is difficult to “conclude” this thesis; Mongolia is really only just at the beginning of the extractive neoliberal order that has been recently instituted. At the moment, the country remains formally democratic, and it seems that the efforts the Mongolian government took to regain investor confidence have begun to make some impact in improving the state’s standing in relation to foreign investors. However, following the evidence presented in this thesis, it is difficult to be optimistic about Mongolia’s future as a global exporter of minerals. Beyond pragmatic questions of regaining investment in the short-term, a concern lingers that the Mongolian people have lost a meaningful voice, as well as ownership rights, in the governance of their natural resources as a result of the state’s capitulation to the demands of transnational

capitalists. Furthermore, the state's financial capacity to effectively diversify the economy by investing in value-adding infrastructure for the mining sector (e.g. copper smelters) is currently hampered by new fiscal limits on spending and looming debt repayments. To be sure, there still may be opportunities to increase national public benefit from the mining sector. The stewardship of these opportunities will depend very much on the skill of Mongolian political leadership in maintaining a long-term perspective as they negotiate with foreign investors, and the political will to redistribute resources to the Mongolian public.⁷⁵

The purpose of this chapter has been to summarise and weave together the analytical threads of the whole thesis and to develop some of the implications for democratic politics and law that are at stake in Mongolia's integration into the global minerals economy. Of course, only a limited amount of time has passed since the "crisis" of investor confidence, but already significant 'symbolic' shifts are evident in Mongolian law and politics, alongside a demonstrable level of 'practical' change within Mongolia's mining regime (Shaffer, 2014: 12). As summarised in the first part of this chapter, all five dimensions of a transnational legal ordering process (Shaffer, 2014) are evident in the Mongolian case as a result of the pro-investment "stability" consensus. These include: substantive legal reform in minerals and investment legislation; new scope for the market in relation to the state; the redistribution of institutional power to executive and administrative state institutions; an increase in the state's value of professional expertise and international standards; and new patterns of 'multi-stakeholder' modes of association, between the state, investors/mining companies, and civil society.

⁷⁵ I plan to compose a short policy brief based on some of the issues raised in this thesis to send to the government officials, NGOs, corporate and IFI representatives who participated in the research project.

These dimensions of reordering reflect the shift in power along the three key institutional axes analysed in the previous two chapters: within the central state; between the central state and local governments; and between the state and organised civil society. Designed to resurrect investor confidence after the collapse of FDI in 2012-2013, these diverse mechanisms promote and guarantee the stability of the investment environment to varying degrees. Some aspects, such as national legal reform, have an immediate impact on the investment environment, while others, such as the promotion of tri-partite collaboration between state, corporate, and civic actors, have more long-term normative implications. In either case, the combination of legal reform, a new pro-FDI discourse, and the introduction of new governance norms amounts to a holistic process of state transformation.

In the second section of the chapter, I argued that the costs of state transformation are borne by the democratic institutions and norms of the state, notably the rule of law, which has been subordinated to a new basic norm: legal change is illegitimate if it presents political risk to investors. In Mongolia, the bar of what constitutes political risk was set fairly low; the claim of “resource nationalism” was levied against a state that maintained a broadly pro-investment position even as the government strengthened aspects of state control within a neoliberal market framework (see also Hatcher, 2014; Lander, 2013). Despite the rhetoric of “it’s economic, not political,” the stakes are high: the constitution of the national state of Mongolia.

While no formal constitutional reform has been made to Mongolia’s 1992 constitution, the practice and norms of politics and law, as well as the scope national autonomy in relation to foreign investors, have been significantly affected by the FDI crisis. Notably, this transformation has been largely implemented

by state actors and institutions, reinforcing the point that ‘as institutions, national states are becoming deeply involved in the implementation of the global economic system’ (Sassen, 2007: 33). Importantly, however, Sassen notes that, depending on the outcome of the ‘negotiations between the global and the national’ (ibid: 22), there is a change in ‘the meaning of the state’s exclusive authority over that territory’ (ibid: 33).

Consequently, it is no small matter that the interests and rights of a transnational *economic* constituency – investors – have been inscribed into national law and protected by the state. The inordinate influence of investor preferences on the trajectory of law reform in Mongolia’s mining regime reflects a new hierarchical balance between the state’s national and ‘supraterritorial’ (Scholte, 1997: 430) constituencies. These are fundamentally constitutional issues, relating to state sovereignty (Article 1), the vesting of state power in citizens alone (Article 3), and pluralistic economic development (Article 5). However, the “economic” frame of Mongolia’s mining transformation disguises its profound political dimensions, making it all too easy for the *de facto* constitutional implications of Mongolia’s globalised mining economy to be ignored or not even recognised.

The Mongolian case study offers a stark example of the transformative power of global capital in relation to national states, in the context of the global economy. It provides an empirically informed example of state transformation in a global era based on a tangible encounter between the national state and global processes of investment. I argued in this thesis that the democratic aspects of the national Mongolian state have suffered from their encounter with processes of “new (global)

constitutionalism,"⁷⁶ which privilege the protection of private property rights and capital mobility to sustain and benefit global markets.

⁷⁶ Recalling its definition in the introductory chapter, new constitutionalism refers to 'the politico-juridical project associated with disciplinary neoliberalism and market civilisation that seeks to lock in the power of capital through a series of pre-commitment mechanisms and disciplines' (Gill & Cutler, 2014: 320).

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Appendix One - Schedule of Interviews

Government (17)

Former Deputy Director of Legal Policy Department, Ministry of Justice, and Member of the Oyu Tolgoi Working Group prior to the signing of the Investment Agreement **(October 2015)**

Senior Policy-Maker, Ministry of Mining **(November 2015)**

Director, Strategic Policy and Planning Department, Ministry of Mining **(October 2015)**

Head of Environment and Geology, Mining Inspection Department, General Agency for Specialised Inspection **(November 2015)**

Head of Mining Division, Mineral Resources Authority of Mongolia **(November 2015)**

Officer, Economic Research and Tax, Mineral Resources Authority of Mongolia (MRAM) **(October 2015)**

Senior Officer, Investment Policy and Assessment Division, Invest Mongolia Agency **(November 2015)**

Former Economic Advisor to N. Altankhuyag when he was Deputy Prime Minister of the coalition government of the Mongolian People's Party and Democratic Party (2008-2012) **(November 2015)**

Managing Director, Erdenes Mongol LLC **(November 2015)**

Chief Legal Officer, Erdenes Mongol LLC **(November 2015)**

Senior Investment Analyst, Erdenes Mongol LLC **(November 2015)**

Head of Monetary Policy, Mongol Bank **(November 2015)**

Local Government Personnel

Director of Development Policy Department, Governor's Office of Selenge Aimag **(November 2015)**

Soum Chairwoman, Dornogovi Aimag **(October 2015)**

Soum Governor, Bayankhongor Aimag **(October 2015)**

Environmental Inspector, Bulgan Soum, Hovd Aimag **(October 2015)**

Environmental Inspector, Oinch Soum, Hovd Aimag **(October 2015)**

**Organised Civil
Society/Consultancies/International
Financial Institutions (11)**

Director, Economic Policy and Competitiveness Research Centre **(November 2015)**

Executive Director, Mongolian Environmental Civil Council **(November 2014; October 2015)**

Director, Bayankhongor Branch of the Mongolian Environmental Civil Council **(October 2015)**

Environmental Adviser, Sustainability East Asia LLC **(November 2014)**

Consultant A, Infrastructure and Natural Resources Advisory Services for the IFC (World Bank Group) **(November 2015)**

Consultant B, Social Development Specialist for the IFC (World Bank Group) **(September 2014)**

Senior Representative, Integrated Mineral Resource Initiative, GIZ **(January 2016)**

Lead Community Relations Consultant for Oyu Tolgoi LLC **(August 2014)**

National Committee on Gender Equality **(October 2014)**

Prominent civic advocate **(November 2015)**

Vice President, United Movement for Mongolian Rivers and Lakes, Bagh Governor, Uverkhangai Aimag **(November 2014)**

Mining and Investment Organisations (6)

President, Mongolian National Mining Association **(November 2015)**

President, Association of Investors in Mongolian Mining **(November 2015)**

CEO, Foreign-Invested Mining Company **(January 2015)**

General Manager, Mongolian Office, Sumitomo Corporation **(November 2015)**

Deputy Director, Resource Strategy and Innovation, Oyu Tolgoi LLC (**November 2015**)

Environmental Manager, Oyu Tolgoi LLC (**November 2014**)

Forums Observed

2014

Multi-Stakeholder Forum on Herding, Mining and Climate (hosted by the Centre for Socially Responsible Mining (CSRM) and the Mongolian Environmental Civil Council), 29th September 2014

- Approximately forty participants representing herders' associations, local governments (*aimag* and *soum*), environmental NGOs, and the Ministry of Environment and Green Development

Water Policy Discussion, hosted by the Mongolian Environmental Civil Council) 11th November 2014

- Approximately 15 participants representing environmental NGOs discussing perspectives on different aspects of water policy, including related to the mining sector

Multi-Stakeholder Workshop on Community Development Agreements supported by the Ministry of Mining, the World Bank's Mining Investment Infrastructure Support Project (MINIS), and the Sustainable Development Strategies Group (SDGS), 7th November 2014

- Approximately 70 participants representing local governments (*soum* and *aimag*), the Ministry of Mining, Mineral Resources Authority of Mongolia, the Anti-Corruption Authority, international social consultants and social/environmental NGOs.

4th National Forum for Environmental NGOs hosted by the Mongolian Environmental Civil Council, 24th November 2014

- 300+ representatives from environmental NGOs, as well as representatives from the Mongolian Environmental Civil Council, and the Ministry for Environment and Green Development

2015

"Artisanal and Small-Scale Mining Economic Contributions into Local Development" Annual Regional Workshop, hosted by the Swiss Agency for Development and Cooperation (SDC), Bayankhongor Aimag, 21st-22nd October 2015

- Approximately 70 participants representing local governments from Western Mongolia, including *khural* chairpersons, governors and development specialists, and local environmental NGOs

G7 Fast Track Partnership Conference on the Extractive Industries Transparency Initiative, hosted by the Ministry of Mining and the German-Mongolian Development Cooperation Organisation, and implemented by the German Development Corporation (GIZ), 10th-11th November 2015

- 100+ participants representing the Ministry of Mining, the German Development Corporation (GIZ), the EITI International Secretariat, EITI Mongolia Secretariat, Corporate Social Responsibility consultancies, the Mongolian National Mining Association, EITI Secretariat representatives from Myanmar, Cambodia, Laos and Vietnam, among others

5th National Corporate Social Responsibility Forum, hosted by the Ministry of Labour, the Ministry of Mining and the German-Mongolian Development Cooperation Organisation, and implemented by the German Development Corporation (GIZ) 11th November 2015.

- 60+ participants representing the Ministry of Labour, Ministry of Mining, Ministry of Finance, German Development Corporation (GIZ), UNICEF, Neville Tiffen and Associates, National Mining Association, Minter Ellison, Oyu Tolgoi, among others

Appendix Two - Sample Interview Questions

Central Government Interviews (Ministry of Mining, Mineral Resources Authority of Mongolia, Erdenes Mongol LLC, Invest Mongolia Agency, General Inspection Agency, Central Bank)

Which national institutions are responsible for developing and implementing policy frameworks? How are responsibilities distributed and coordinated across institutions?

Are there conflicts between the priorities of different ministries in relation to the mining sector?

What are the strategic goals of the State Policy on the Minerals Sector (2014-2025)?

What are the main challenges to foreign investment?

Why did investment decline so suddenly in 2012? Was this due mainly to commodity prices, or did the state's regulation of the mining sector have a role to play?

What factors are considering in the mining licensing process? To what extent are local governments included in the decision to issue mining licenses?

What is the institutional relationship between the Ministry of Mining and the Mineral Resources Authority of Mongolia?

How would you describe "good governance" in the mining sector?

In your view, what has the central government gotten "right"/ "wrong" in the governance of mining in recent years? How has the legal environment changed?

Is the label "resource nationalism" unfair to describe the policies and actions of the government in recent years?

Are investors having an undue influence on national law and policy-making?

What do you see as the main challenges to the development of a responsible and economically sustainable mining sector?

How important are local governments in mining governance? What are their responsibilities?

Similarly, what role do you see for NGOs in governance, if at all?

To what extent is collaboration between mining companies, the government, and civil important in mining governance? What do you see as the role for each of these groups?

Local Government Interviews (*Aimag* and *Soum*)

How important is the mining sector for regional/local development?

Would you like to see more mining or less in your province?

What should be the role of the central government in rural economic development?

How are mining governance responsibilities distributed between different branches of local government?

How are local concerns about mining address by local governments?

What is the remedy for negative social and environmental impacts from mining?

To what extent can local governments limit mining in their jurisdictions?

How dependent are local governments upon mining? Are there financial incentives to approve licenses in your region?

How are mining rents distributed? Are all mining rents redistributed via the central budget, or some revenues paid directly into local budgets?

In your view, what are the opportunities and risks in Community Development Agreements?

How are competing pressures from the mining sector, local residents and central government managed?

Environmental Civil Society

In your view, what are the main challenges in the mining sector today?

How has the role of the state and mining companies changed over time?

What is the role of civil society in mining governance?

Part of the government action strategy is to increase cooperation between NGOs and the government. How has this policy been put into practice, if at all?

What opportunities are available to expand the role of NGO's in governance?

What sort of issues arise when engaging in multi-stakeholder processes with mining companies and governments? How can problems be overcome?

To what extent is civil society a safeguard for the public interest in relation to mining? Are NGOs more responsive to citizens than government representatives?

Do all NGOs share the same goal?

What are the conditions for registering with the Mongolian Environmental Civil Council? What is the structure of representation within the MECC?

How do citizens access their local MECC council? What is the relationship between local MECC council and local *khurals*?

What points of institutional access do NGOs and/or the MECC have with central and local branches of government?

Investor/Mining Company Representatives

From your perspective, what was the cause of the sudden decline of foreign investment in 2012 and 2013?

How would you describe the actions of the government in relation to the mining sector?

What is your opinion of the reforms since 2014 to regain investor confidence?

What points of institutional access do mining and investor representatives have with the Ministry of Mining and the Invest Mongolia Agency, as well as other government institutions?

How would you describe the relationship between mining companies and local governments, and local communities? In your view, what issues are Local Development Agreements addressing? What benefits might they offer, if any?

How would you describe the relationship between investors and the government after 2014? Has it improved?

How easy is it to invest following reform to the Investment Law in 2013?

What are the main priorities in negotiating investment agreements?

What was your opinion on the controversial actions of the government, such as Strategic Entities Foreign Investment Law in

2012 and the attempt to renegotiate the Oyu Tolgoi Investment Agreement? From your point of view, is there any legitimate basis for the state to reconsider its relationship with foreign investors?

What should the role of the state be in relation to such an important economic sector?